

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 581

SOUTHLAND GASOLINE COMPANY, PETITIONER,

VS.

**J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL,
ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

PETITION FOR CERTIORARI FILED DECEMBER 10, 1942.

CERTIORARI GRANTED JANUARY 18, 1943.

SUPREME COURT OF THE UNITED STATES

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[fol. a]

[Caption omitted]

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**IN DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF ARKANSAS, FAY-
ETTEVILLE DIVISION**

Civil Action No. 29

J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL, OWEN
REDING and W. J. BAYLEY, Plaintiffs,

vs.

SOUTHLAND GASOLINE COMPANY, Defendant

COMPLAINT—Filed January 2, 1942

The plaintiffs above named state that this is an action in which the plaintiffs are seeking to recover money under the provisions of the Act of the Congress of the United States, officially designated as the "Fair Labor Standards Act" of 1938."

The plaintiffs herein assert a right, the correct decision of which depends upon the construction and application of said Act and is a case over which the United States District Court have jurisdiction without regard as to the amount in controversy.

As a further allegation of the grounds upon which jurisdiction depends, plaintiffs state that the "Fair Labor [fol. 3] Standards Act of 1938," in Section 16 (B) thereof provides that an action to recover money under said Act may be maintained in any court of competent jurisdiction.

I

Plaintiffs allege that the above named defendant was on and since the 24th day of October, 1938, engaged in interstate commerce and in the production of goods for interstate commerce as defined by the said Fair Labor Standards Act of 1938.

Plaintiffs further allege that they are individual employees of said defendant and that plaintiff J. W. Bayley resides in Fort Smith, Arkansas, and that the other plaintiffs herein, Henry V. Bloom, G. C. Kendall, Owen Reding and W. J. Bayley reside in Springdale, Arkansas.

Plaintiffs further allege that

Defendant Southland Gasoline Company is a corporation duly created under the laws of the State of Arkansas and has its principal place of business in the City of Springdale, Arkansas.

Plaintiffs allege that each week during the period of time between October 24, 1938 and October 15, 1940 defendant corporation engaged in the gasoline business, and in pursuance of carrying on said gasoline business performed the following activities:

Defendant corporation each week purchased gasoline, automobile tires, batteries, and automobile accessories in the State of Oklahoma, caused aforesaid articles to be loaded upon defendant's trucks, and transported same to the State of Arkansas, where defendant corporation sold the gasoline, tires, batteries, and accessories in wholesale lots to retail establishments in the State of Arkansas, the retail establishments purchasing the above-mentioned commodities for the purpose of resale at retail to the general public.

Defendant corporation each week loaded trucks in the State of Arkansas with automobile tires, accessories, and automotive equipment, and transported aforesaid articles to the State of Oklahoma where the tires and other equipment was sold at wholesale to the retail establishments in that State for resale to the general public.

[fol. 4] Defendant corporation built and maintained service stations in Arkansas, and also built and maintained facilities for storing large quantities of gasoline and automotive merchandise, and that defendant in addition to the above stated enterprises, delivered gasoline and merchandise in very large quantities to such storage places to be stored until such time as the Southland Gasoline Co. should need same to supply their needs, and to sell to retail service stations in the State of Arkansas.

Defendant corporation in the conduct of its business aforesaid operated and maintained large trucks and tank cars, which trucks and tank cars made regular daily trips from Arkansas into Oklahoma, and from Oklahoma into Arkansas carrying gasoline and automotive merchandise in wholesale quantities for sale to the retail establishments in the state of destination.

Plaintiffs allege that defendant corporation engaged in the aforesaid trucking operations as a private carrier.

II

Plaintiffs allege that between the dates of October 24, 1938 and May 15, 1941 they were each employees of defendant corporation and that during each week between said dates each was as such employee of defendant engaged in interstate commerce and in producing goods for interstate commerce as set out in paragraph "I" above.

Plaintiffs allege that each was employed by the defendant as truck-drivers, and that each plaintiff in this capacity drove defendant's trucks each week from Arkansas to Oklahoma and from Oklahoma to Arkansas.

Plaintiffs allege that the trucks which each plaintiff drove for the defendant from Arkansas to Oklahoma and from Oklahoma to Arkansas were trucks which were used by defendant in carrying on the business practices and activities enumerated under paragraph "I" of this complaint.

Plaintiffs allege that each plaintiff as employee and defendant as employer were, each week since the date of October 24, 1938 to the date of May 15, 1941, engaged in interstate commerce and in the production of goods for interstate commerce, as fully set out in paragraph "I" above.

[fol. 5]

III

Plaintiff J. W. Bayley alleges that he worked for the defendant as above set out 100 weeks during the period of time between October 24, 1938 and October 15, 1940, and that he was not paid in accordance with the Fair Labor Standards Act for his work during this period.

The following table enumerates and sets out the weeks during this period of time in which weeks plaintiff Bayley was not paid in accordance with said Act. The table alleges the number of hours worked by plaintiff J. W. Bayley in each of these weeks, his compensation, and the amount to which he was entitled under the Fair Labor Standard Act of 1938, as follows:

Date	Weeks	Weekly Wage	Hours Worked	Hours O. T.	Time and at Half Time	Amount Due
1938						
10-24 10-29	1	\$20.00	60	16	50¢	\$8.00
10-31 11-5	1	\$20.00	55	11	54¢	\$5.94
11-7 11-12	1	\$20.00	52	8	60¢	4.80
11-14 11-19	1	\$20.00	61½	17½	50¢	8.75
11-28 12-3	1	\$20.00	60	16	50¢	8.00

Date	Weeks	Weekly Wage	Hours Worked	Hours O. T.	Time and at Half Time	Amount Due
1938						
12-5 12-10	1	\$20.00	56	12	52¢	6.24
12-12 12-17	1	\$20.00	57	13	53¢	6.89
12-19 12-24	1	\$20.00	54	10	54¢	5.40
12-26 12-31	1	\$20.00	53	9	60¢	5.40
1939						
1-2 1-7	1	\$20.00	59	15	50¢	7.50
1-9 1-14	1	\$20.00	58½	14½	51¢	7.39
1-16 1-21	1	\$20.00	59½	15½	50¢	7.75
1-23 1-28	1	\$20.00	56	12	52¢	6.24
1-30 2-4	1	\$20.00	57½	13½	53¢	6.90
2-6 2-11	1	\$20.00	56½	12½	52¢	6.24
2-13 2-18	1	\$20.00	62	18	48¢	8.64
2-20 2-25	1	\$20.00	56	12	52¢	6.24
2-27 3-4	1	\$20.00	59	15	50¢	7.50
3-6 3-11	1	\$20.00	61½	17½	50¢	8.50
3-13 3-18	1	\$20.00	64	20	47¢	9.40
3-20 3-25	1	\$20.00	69	25	43¢	10.75
3-27 4-1	1	\$20.00	60½	16½	50¢	8.25
4-3 4-8	1	\$20.00	60	16	50¢	8.00
4-10 4-16	1	\$20.00	71½	27½	42¢	11.34
4-17 4-22	1	\$20.00	70	26	43¢	11.18
[fol. 6]						
4-24 4-30	1	\$20.00	65	21	45¢	9.45
5-1 5-6	1	\$20.00	74	30	40¢	12.00
5-8 5-13	1	\$20.00	65	21½	45¢	9.67
5-15 5-20	1	\$20.00	68	24	43¢	10.32
5-22 5-26	1	\$20.00	51	7	58¢	4.06
5-28 6-3	1	\$20.00	73	29	41¢	11.89
6-5 6-11	1	\$20.00	66½	22½	45¢	9.90
6-12 6-17	1	\$20.00	82	38	37½	14.25
6-19 6-25	1	\$20.00	65	21	45¢	9.45
6-26 7-1	1	\$20.00	65½	21½	45¢	9.45
7-3 7-8	1	\$20.00	61	17	50¢	8.50
7-9 7-15	1	\$20.00	86	42	37¢	15.75
7-24 7-29	1	\$20.00	83½	39½	37½@	14.57
7-31 8-5	1	\$20.00	58	14	51¢	7.14
8-7 8-12	1	\$22.50	88	44	38¢	16.72
8-14 8-20	1	\$22.50	68½	24½	50¢	12.00
8-21 8-26	1	\$22.50	56	12	60¢	7.20
8-28 9-3	1	\$22.50	70	26	48¢	12.48
9-4 9-9	1	\$22.50	76	32	45¢	14.40
9-11 9-17	1	\$22.50	63½	19½	52¢	9.88
9-18 9-23	1	\$22.50	63	19	52¢	9.88
9-25 9-30	1	\$22.50	55½	11½	60¢	6.90
10-2 10-7	1	\$22.50	81	37	41¢	15.17
10-9 10-15	1	\$22.50	71½	27½	47¢	12.69
10-16 10-22	1	\$22.50	77	33	44¢	14.52
10-24 10-29	1	\$22.50	66½	24½	51¢	12.45
10-30 11-4	1	\$22.50	76	34	45¢	15.30
11-6 11-11	1	\$22.50	58	14	57¢	7.98
11-13 11-18	1	\$ Vacation				
11-20 11-26	1	\$22.50	68	26	50¢	13.00
11-27 12-3	1	\$22.50	73	31	45¢	13.95
12-5 12-10	1	\$22.50	59	17	57¢	9.69
12-11 12-16	1	\$22.50	65	23	52¢	11.96
12-18 12-23	1	\$22.50	56½	14½	60¢	8.40
12-26 12-30	1	\$22.50	55	13	60¢	7.80
1940						
1-1 1-6	1	\$22.50	56½	14½	60¢	8.40
1-8 1-13	1	\$22.50	62	20	53¢	10.60
1-15 1-20	1	\$22.50	61	19	54¢	10.46

Date	Weeks	Weekly Wage	Hours Worked	Hours O. T.	Time and at Half Time	Amount Due
1940						
1-21	1-25	1	\$22.50	49	7	67¢ 4.69
1-30	2-31	1	\$22.50	60	18	53¢ 9.90
2-5	2-10	1	\$22.50	62	20	53¢ 10.60
2-12	2-17	1	\$22.50	62	20	53¢ 10.60
2-19	2-24	1	\$22.50	60	18	55¢ 9.90
2-26	3-3	1	\$22.50	72	30	46¢ 13.80
3-4	3-9	1	\$22.50	62	20	53¢ 10.60
3-11	3-16	1	\$22.50	58	16	57¢ 9.12
[Feb. 7]						
3-18	3-23	1	\$22.50	75	33	45¢ 14.85
3-25	3-31	1	\$22.50	64	22	53¢ 11.66
4-1	4-6	1	\$22.50	71	29	47¢ 12.63
4-8	4-14	1	\$22.50	61	19	54¢ 10.46
4-15	4-19	1	\$22.50	64	22	53¢ 11.66
4-22	4-28	1	\$22.50	64½	22½	53¢ 11.66
4-29	5-5	1	\$22.50	86½	44½	45¢ 19.80
5-6	5-12	1	\$22.50	70	28	48¢ 13.44
5-13	5-17	1	\$22.50	70½	28½	48¢ 13.44
5-20	5-26	1	\$22.50	66	24	51¢ 12.24
5-27	5-31	1	\$22.50	70	28	48¢ 13.44
6-5	6-9	1	\$22.50	62½	20½	53¢ 10.60
6-10	6-15	1	\$22.50	84	42	45¢ 18.90
6-17	6-23	1	\$22.50	65½	23½	52¢ 11.96
6-24	6-29	1	\$22.50	81½	39½	45¢ 16.77
7-1	7-7	1	\$22.50	56½	14½	60¢ 8.40
7-8	7-13	1	\$22.50	86	44	45¢ 19.80
7-15	7-21	1	\$22.50	62½	20½	53¢ 10.60
7-22	7-27	1	\$22.50	82	40	45¢ 18.00
7-29	8-3	1	\$22.50	54	12	61¢ 7.32
8-5	8-10	1	\$22.50	58	16	57¢ 9.12
8-12	8-17	1	\$22.50	58	16	57¢ 9.12
8-19	8-24	1	\$22.50	55	13	61¢ 7.93
8-26	8-31	1	\$22.50	56	14	60¢ 8.40
9-2	9-7	1	\$22.50	85	43	45¢ 19.35
9-9	9-15	1	\$22.50	65	23	52¢ 11.96
9-16	9-21	1	\$22.50	70	28	48¢ 13.44
9-23	9-29	1	\$22.50	67	25	50¢ 12.50
9-30	10-5	1	\$22.50	88	46	45¢ 20.70
10-7	10-13	1	\$22.50	64	22	53¢ 11.66

Total Over-Time \$1070.29.

Plaintiff, J. W. Bayley alleges that during the 100 weeks between October 24, 1938 and October 15, 1940, as above set out, the Fair Labor Standards Act was in force and effect and provided for a minimum wage of 25¢ per hour and a maximum hours of 44 hours per week from October 24, 1938, to October 24, 1939, and that said Act provided for a minimum wage of 30¢ per hour and a maximum week of 42 hours from October 24, 1939 to October 24, 1940, and also provides for time and one-half time for hours worked over the maximum at the regular rate of pay, and not less than the minimum wage.

Plaintiff J. W. Bayley further alleges that the number of hours worked each week divided into the salary or wage [fol. 8] paid constitutes the average hourly wage, and that during all of the time he worked for the defendant he performed the duties and activities set out on Paragraph "I" of this complaint, and that he has due him the sum of \$1070.29, for over-time compensation as set out in the above table, that no part thereof has been paid and that he should have judgment against the defendant for said sum together with an additional equal amount as liquidated damages, together with an allowance for fees for his attorneys, together with all cost of this action.

IV

Plaintiff Henry V. Bloom alleges that he began working for defendant July 28, 1940 and continued such work until May 10, 1941; that as such employee he drove a truck for defendant and performed other duties required of him by defendant, said activities being set out more fully in paragraph "I" of this complaint; that from July 28, 1940 to October 15, 1940 he worked for defendant 11 weeks, 72 hours each week, and received as salary \$15.00 per week.

Plaintiff Henry V. Bloom further alleges that from October 15, 1940 to January 1, 1941 he worked for defendant, performing the same duties, a total of 11 weeks, and worked 72 hours each week, and received a wage of \$16.25 per week; that from January 6, 1941 to May 10, 1941 he continued work for defendant, driving a truck for defendant and engaged in the activities specifically set out in paragraph "I" of this complaint, 9 weeks of which time plaintiff Bloom was not paid in accordance with the provisions of the Fair Labor Standards Act. Plaintiff Henry V. Bloom alleges that the following table sets forth weeks during this period of time in which weeks he was not compensated in accordance with the Fair Labor Standards Act, the hours worked during each of such weeks, the pay received, and the amount plaintiff Bloom is entitled to recover, as follows:

[fol. 9]

Date	Weeks	Weekly Wage	Hours Worked	Hours O. T.	Time and Half-Time	Amount Due Plaintiff
1940						
7-28 8-3	1	\$16.25	72	30	45¢	\$13.50
8-4 8-10	1	\$16.25	72	30	45¢	13.50
8-11 8-17	1	\$16.25	72	30	45¢	13.50
8-18 8-24	1	\$16.25	72	30	45¢	12.50
8-25 8-31	1	\$16.25	72	30	45¢	13.50
9-1 9-7	1	\$16.25	72	30	45¢	13.50
9-8 9-14	1	\$16.25	72	30	45¢	13.50
9-15 9-21	1	\$16.25	72	30	45¢	13.50
9-22 9-28	1	\$16.25	72	30	45¢	13.50
9-29 10-5	1	\$16.25	72	30	45¢	13.50
10-6 10-12	1	\$16.25	72	30	45¢	13.50

October 15, 1940 Over Time \$148.50

Plaintiff, Henry V. Bloom, alleges that he is entitled to minimum wages under said Act from the 15th day of October, 1940, to the 10th day of May, 1941, as set forth in the following table:

Date 1941	Week	Am't Rec'd.	Hours Worked	Should Have Rec'd 30¢ Per Hour or	Difference	Amount Due
1-6 1-12	1	\$16.25	78½	\$23.55	\$7.30	\$7.30
2-9 2-15	1	\$16.25	66	\$19.80	3.55	3.55
2-23 3-1	1	\$16.25	63	\$18.90	2.65	2.65
3-24 3-30	1	\$16.25	66	\$19.80	3.55	3.55
3-31 4-5	1	\$16.25	55	\$16.50	.25	.25
4-6 4-12	1	\$16.25	74½	\$22.35	6.10	6.10
4-13 4-19	1	\$16.25	69	\$20.70	4.45	4.45
4-20 4-25	1	\$16.25	64	\$19.20	2.95	2.95
5-5 5-10	1	\$16.25	61½	\$18.45	2.20	2.20

Amount Due Under Minimum Wage \$ 91.85
 Amount Due Under Over Time 148.50

Total Amount Due \$240.35

The plaintiff, Henry V. Bloom, further alleges that during the time between July 28, 1940, and May 10, 1941, as shown in the above table, the Fair Labor Standards Act was in force and effect and provided for a minimum wage of 30¢ per hour and also provided for a maximum week of 42 hours up to October 24, 1940, and also provides for payment of time and half time for all over-time up to and [fol. 10] including October 15, 1940, at the regular rate per week, if not less than the minimum wage was paid.

The plaintiff, Henry V. Bloom, further alleges that the number of hours worked each week divided into the weekly wage or minimum wage determines the rate per hour and establishes the hourly wage as used in the above table, and that during all the time he worked for said defendant as set out in the above table, he performed the duties and

activities as defined and set out in paragraph one of this complaint and that he has now due him the sum of \$48.50, under the over-time provision or maximum hours provision of said Act and the further sum of \$91.85, under the minimum wage provision of said Act or a total of \$240.35, and that no part thereof has been paid and that he should have judgment against the said defendant for said sum together with a like amount for penalty, together with attorney fees for his attorneys and all cost of this action as provided for by said Fair Labor Standards Act.

V

The plaintiff, G. C. Kendall, alleges that he began working for the above named defendant, operating one of its trucks and performing the other duties and activities for defendant as employee as set out in paragraph one of this complaint, on the 8th day of December, 1939, and continued as such employee until the 15th day of May, 1941, and received the sum of \$90.00, per month or \$22.50, per week during said period of time.

Plaintiff, G. C. Kendall, further states that from the said 8th day of December, 1939, to the 15th day of October, 1940, he worked for said defendant as above set out 43 weeks of 90 hours each week, of which 90 hours so worked, 48 hours each week were over-time as defined by the said Fair Labor Standards Act and that the said 90 hours divided into his weekly wage of \$22.50, was therefore less than the minimum wage of 30c per hour as provided by said Act and that he is entitled to time and half-time for said over-time at the rate of 30c per hour over-time or 45c per hour for said over-time.

Plaintiff, G. C. Kendall, states and alleges that he has not been paid for said over-time and that he is entitled to the sum of \$21.60 per week for 43 weeks or a total of \$928.80.

[fol. 11] Plaintiff, G. C. Kendall, alleges that from October 15, 1940, to November 1, 1940 he worked for said defendant as above set out two weeks of 90 hours each week, for which he was not paid the minimum wage as provided for by said Act, in that he was paid only \$22.50, and should have been paid \$27.00, per week as required by said Act and that he has due him the sum of \$4.50, per week or a total for said two weeks the sum of \$9.00.

Plaintiff, G. C. Kendall, further alleges that he worked for said defendant as above set out from November 1, to November 6, 1940, one week of 81 hours, for which he received the sum of \$22.50, and that he should have received under said Act the sum of \$24.30, and that he has due him under said Act the sum of \$1.80, and that he has due him, for all the time above set forth, the total sum of \$939.60; and that no part thereof has been paid and that he should have judgment against said defendant for said sum together with a like amount for penalty, attorney fees and court cost as provided for by said Fair Labor Standards Act.

VI

The plaintiff, Owen Reding, alleges that he began working for the defendant, operating one of its trucks and performing the other duties and activities as employee as set out in paragraph "1" of this complaint, on the 24th day of October, 1938, and continued as such employee continuously up to the 11th day of May, 1941.

Plaintiff, Owen Reding, further alleges that he as such employee from the 24th day of October, 1938 up to the 24th day of December, 1938, he worked for said defendant (9) weeks of (60) hours per week and received a weekly wage of \$12.00 each week, or \$48.00 per month, and from December 24, 1938 up to April 29, 1939, he as such employee received the sum of \$48.00 per month or \$12.00 per week, worked irregular hours, as will be set out in the table or tabulation to follow. Said plaintiff alleges that from the said April 29, 1939, up to and including June 17th, 1939, he as such employee of defendant received a salary of \$60.00 per month or \$15.00 per week, and again worked irregular hours each week as will appear from his said table or tabulation to follow.

Plaintiff alleges that from June 24th, 1939 to May 18, 1940 he continued to work for defendant as above set out, [fol. 12] and received a wage of \$65.00 per month or \$16.25 per week, and worked irregular hours each week, as will — shown by the said table or tabulation to follow.

Plaintiff Owen Redding alleges that from the 20th day of May, 1940 up to and including the 11th day of May, 1941, he as such employee of the said defendant continued to work and received each week as wages the sum of \$70.00 per month or \$17.50 per week, and again worked irregular

hours, but the table or tabulation to follow will show the hours worked:

Plaintiff Reding alleges that the time worked, each week, the wages received, and the amount to which he is entitled to receive under the provisions of the Fair Labor Standards Act, are set out in the following table or tabulation as follows:

Date	Weeks	Weekly Wage	Hours Worked	Hours O. T.	Time and at Half Time	Amount Due
1938						
10-24 10-29	1	\$12 00	60	16	37½	\$6 00
10-31 11-3	1	\$12 00	60	16	37½	6 00
11-7 11-12	1	\$12 00	60	16	37½	6 00
11-14 11-19	1	\$12 00	60	16	37½	6 00
11-21 11-26	1	\$12 00	60	16	37½	6 00
11-28 12-3	1	\$12 00	60	16	37½	6 00
12-5 12-10	1	\$12 00	60	16	37½	6 00
12-12 12-17	1	\$12 00	60	16	37½	6 00
12-19 12-24	1	\$12 00	60	16	37½	6 00
12-26 12-31	1	\$12 00	65	21	37½	7 87
1939						
1-2 1-7	1	\$12 00	69½	25½	37½	9 56
1-9 1-14	1	\$12 00	66	22	37½	8 25
1-16 1-21	1	\$12 00	74	30	37½	11 25
1-24 1-28	1	\$12 00	58	14	37½	5 25
1-30 2-4	1	\$12 00	64	24	37½	7 00
2-6 2-11	1	\$12 00	65	21	37½	8 17
2-13 2-18	1	\$12 00	60½	16½	37½	6 18
2-20 2-25	1	\$12 00	64½	20½	37½	7 18
2-27 3-4	1	\$12 00	61½	17½	37½	6 65
3-6 3-11	1	\$12 00	64	20	37½	7 00
3-13 3-16	1	\$12 00	71½	27½	37½	10 31
3-20 3-25	1	\$12 00	68½	24½	37½	9 18
3-27 4-1	1	\$12 00	63½	19½	37½	6 82
4-3 4-8	1	\$12 00	74½	30½	37½	11 43
4-10 4-15	1	\$12 00	61	17	37½	6 37
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4-17 4-22	1	\$12 00	57	13	37½	4 87
4-24 4-29	1	\$12 00	76	32	37½	12 00
5-1 5-3	1	\$15 00	63½	19½	37½	6 82
5-8 5-13	1	\$15 00	63½	19½	37½	6 82
5-15 5-20	1	\$15 00	64	20	37½	7 00
5-22 5-27	1	\$15 00	65½	21½	37½	7 55
5-29 6-3	1	\$15 00	64	20	37½	7 00
6-5 6-10	1	\$15 00	63	19	37½	6 63
6-12 6-17	1	\$15 00	70	26	37½	9 75
6-19 6-24	1	\$16 25	62	18	37½	6 26
6-26 7-1	1	\$16 25	71	27	37½	10 13
7-3 7-8	1	\$16 25	54	10	37½	3 75
7-10 7-15	1	\$16 25	66	22	37½	8 25
7-17 7-22	1	\$16 25	65	21	37½	7 37
7-24 7-29	1	\$16 25	65	21	37½	7 37
7-31 8-5	1	\$16 25	68½	24½	37½	9 18
8-7 8-12	1	\$16 25	60	16	37½	6 00
8-14 8-19	1	\$16 25	62½	18½	37½	6 44
8-21 8-26	1	\$16 25	63	19	37½	6 63
8-28 9-2	1	\$16 25	60	16	37½	6 00
9-4 9-9	1	\$16 25	60	16	37½	6 00
9-11 9-17	1	\$16 25	69½	25½	37½	9 37

Date	Weeks	Weekly Wage	Hours Worked	Hours O. T.	Time and at Half Time	Amount Due
1939						
9-26 9-30	1	\$16.25	50½	6½	43¢	2.19
10-2 10-7	1	\$16.25	60	16	41¢	6.56
10-9 10-14	1	\$16.25	57	13	42¢	5.46
10-16 10-21	1	\$16.25	61	17	40¢	6.80
10-23 10-28	1	\$16.25	56	14	45¢	6.30
10-30 11-4	1	\$16.25	56	14	45¢	6.02
11-6 11-11	1	\$16.25	62½	20½	45¢	9.22
11-13 11-18	1	\$16.25	77½	35½	45¢	15.97
11-20 11-25	1	\$16.25	61½	19½	45¢	8.77
11-27 12-2	1	\$16.25	49	7	49¢	3.43
12-4 12-9	1	\$16.25	57	13	45¢	6.75
12-11 12-16	1	\$16.25	60	18	45¢	8.10
12-18 12-22	1	\$16.25	52	10	46¢	4.60
12-26 12-31	1	\$16.25	82	40	45¢	18.00
1940						
1-1 1-5	1	\$16.25	55	13	45¢	5.85
1-8 1-13	1	\$16.25	64½	22½	45¢	10.12
1-14 1-20	1	\$16.25	74½	32½	45¢	14.62
1-21 1-27	1	\$16.25	72	30	45¢	13.50
1-29 2-3	1	\$16.25	66	24	45¢	10.80
2-5 2-11	1	\$16.25	82	40	45¢	18.00
2-14 2-20	1	\$16.25	63	21	45¢	9.45
[fol. 14]						
2-23 2-29	1	\$16.25	68	26	45¢	11.70
3-4 3-9	1	\$16.25	55	13	45¢	5.85
3-11 3-16	1	\$16.25	64½	22½	45¢	10.12
3-18 3-23	1	\$16.25	74½	32½	45¢	14.62
3-25 3-30	1	\$16.25	72	30	45¢	13.50
4-1 4-5	1	\$16.25	57	15	45¢	6.75
4-8 4-13	1	\$16.25	78	36	45¢	16.20
4-15 4-20	1	\$16.25	64	22	45¢	9.90
4-22 4-27	1	\$16.25	64	22	45¢	9.90
4-29 5-4	1	\$16.25	66	24	45¢	10.80
5-6 5-11	1	\$16.25	64½	22½	45¢	10.12
5-13 5-18	1	\$16.25	66	24	45¢	10.80
5-20 5-25	1	\$16.25	71	29	45¢	13.05
5-28 6-1	1	\$17.50	55	13	45¢	5.85
6-3 6-8	1	\$17.50	65	23	45¢	10.35
6-10 6-15	1	\$17.50	67	25	45¢	11.25
6-17 6-22	1	\$17.50	67	25	45¢	11.25
6-24 6-29	1	\$17.50	66½	24½	45¢	11.02
7-1 7-6	1	\$17.50	57½	15½	45¢	6.97
7-8 7-13	1	\$17.50	72	30	45¢	13.50
7-15 7-20	1	\$17.50	72	30	45¢	13.50
7-22 7-28	1	\$17.50	84	42	45¢	18.90
7-29 8-3	1	\$17.50	63½	21½	45¢	9.67
8-5 8-10	1	\$17.50	60	18	45¢	8.10
8-12 8-17	1	\$17.50	63	21	45¢	9.45
8-19 8-24	1	\$17.50	69	27	45¢	12.15
8-26 8-31	1	\$17.50	61	19	45¢	8.55
9-2 9-7	1	\$17.50	67	25	45¢	11.25
9-9 9-13	1	\$17.50	55½	13½	45¢	6.02
9-24 9-30	1	\$17.50	65½	23½	45¢	10.57
10-1 10-5	1	\$17.50	54	12	48¢	5.76
10-7 10-12	1	\$17.50	62½	20½	45¢	9.22

Amount Due Under Over Time \$855.23

Plaintiff, Owen Reding, alleges that he is entitled to minimum wages under said Act from the 15th day of October, 1940, up to the 11th day of May, 1941, at the rate of 30c per hour as set forth in the extended table of tabulation:

Date	Weeks	Am't Rec'd	Hours Worked	Should Have Rec'd 30c Per Hour, or	Difference	Amount Due
1940						
10-14 10-19	1	\$17.50	85	\$25.50	\$8.00	\$8.00
10-21 10-26	1	\$17.50	82	24.60	7.10	7.10
11-18 11-24	1	\$17.50	78	23.40	5.90	5.90
12-1 12-7	1	\$17.50	74½	22.35	4.85	4.85
[fol. 15]						
1941						
12-30 1-5	1	\$17.50	82	24.60	7.10	7.10
1-13 1-19	1	\$17.50	74	22.20	4.70	4.70
1-20 1-26	1	\$17.50	81	24.30	6.80	6.80
2-19 2-25	1	\$17.50	69½	20.85	3.35	3.35
3-1 3-7	1	\$17.50	69½	20.85	3.35	3.35
3-11 3-17	1	\$17.50	69½	19.35	1.85	1.85
3-18 3-24	1	\$17.50	71½	21.45	3.95	3.95
4-1 4-7	1	\$17.50	62	18.60	1.10	1.10
4-23 5-4	1	\$17.50	67½	20.25	2.75	2.75
5-5 5-11	1	\$17.50	65	19.50	2.00	2.00
Amount Due For Minimum Wages						\$ 62.80
Amount Due For Over Time						885.23
Total Amount Due						\$948.03

The plaintiff, Owen Reding further alleges that during the time he was employed by the defendant as set forth in the above and foregoing tables, the Fair Labor Standards Act was in force and effect and that he is entitled to the benefits and provisions of said Act and that he should be allowed time and half for all overtime as shown in the above table, which is arrived at by dividing the number of hours worked each week in to the amount of his weekly wage shown in said table and that the said tables correctly set out the time he worked and the wages he received and the amount he is entitled to receive under the said Fair Labor Standards Act and that the amount of \$885.23, is justly due him under the maximum hours provision of the said Act and that \$62.80, is justly due him under the minimum wage provision of said Act and that no part thereof has been paid and that he should have judgment against the said defendant for the said sum of \$948.03, together with a like amount for penalty, attorney fees and court cost as provided for by the said Fair Labor Standards Act.

VII

Plaintiff W. J. Bayley alleges that he began working for said defendant as a truck driver performing the duties and activities set out and described in paragraph one and two of this complaint, on October 24, 1938, and continued to work for defendant as such employee engaged in such work up to the 15th day of October, 1940.

[fol. 16] Plaintiff further alleges that from the said 24th day of October, 1938, up the 24th day of August, 1939, he received a salary of \$80.00 per month, or \$20.00 per week and from the said 24th day of August, 1939, up to the said 15th day of October, 1940, he continued as such employee of defendant and received a salary or wage of \$90.00, per month or \$22.50, per week.

Plaintiff, W. J. Bayley alleges that he worked as such employee each week irregular hours and that the time, worked each week, the date thereof, the wage received, the amount of over-time worked and the rate to which he is entitled therefor is set forth in detail in the following table or tabulation as follows:

Date	Weeks	Weekly Wage	Hours Worked	Hours O. T.	Time and at Half Time	Amount Due
1938						
10-24 10-29	1	\$20.00	66	22	" 45¢	\$9.90
10-31 11-5	1	\$20.00	66	22	" 45¢	9.90
11-7 11-12	1	\$20.00	66	22	" 45¢	9.90
11-14 11-19	1	\$20.00	66	22	" 45¢	9.90
11-21 11-26	1	\$20.00	64	22	" 46¢	9.20
11-28 12-3	1	\$20.00	66	22	" 45¢	9.90
12-5 12-10	1	\$20.00	64	20	" 45¢	9.20
12-12 12-17	1	\$20.00	62	18	" 48¢	8.64
12-19 12-24	1	\$20.00	62	18	" 48¢	8.64
12-27 12-31	1	\$20.00	60	16	" 48¢	7.68
1939						
1-2 1-7	1	\$20.00	59	15	" 50¢	7.50
1-9 1-14	1	\$20.00	60	16	" 49¢	7.84
1-16 1-21	1	\$20.00	61½	17½	" 48¢	8.40
1-23 1-28	1	\$20.00	55½	11½	" 54¢	6.21
1-30 2-4	1	\$20.00	63	19	" 48¢	9.12
2-6 2-11	1	\$20.00	56½	12½	" 52¢	6.50
2-13 2-19	1	\$20.00	75	31	" 40¢	12.40
2-20 2-25	1	\$20.00	62½	18½	" 48¢	8.88
2-27 3-4	1	\$20.00	55½	11½	" 54¢	6.21
3-6 3-11	1	\$20.00	64	20	" 46¢	9.20
3-13 3-18	1	\$20.00	62	18	" 48¢	8.64
3-20 3-25	1	\$20.00	62	18	" 48¢	8.64
3-27 4-1	1	\$20.00	68	24	" 44¢	10.56
4-3 4-9	1	\$20.00	65	21	" 45¢	9.45
4-10 4-15	1	\$20.00	59	15	" 50¢	7.50
4-17 4-22	1	\$20.00	57½	13½	" 51¢	6.88
4-24 4-29	1	\$20.00	65	21	" 45¢	9.45

	Date	Weeks	Weekly Wage	Hours Worked	Hours O. T.	Time and at Half Time	Amount Due.
1939							
[fol. 17]							
5-1	5-6	1	\$20 00	66	22	45¢	9 90
5-8	5-13	1	\$20 00	64	20	46¢	9 20
5-15	5-20	1	\$20 00	64	20	46¢	9 20
5-22	5-27	1	\$20 00	83	39	37½¢	14 62
5-29	6-3	1	\$20 00	68	24	44¢	10 56
6-5	6-10	1	\$20 00	64	20	46¢	9 20
6-12	6-17	1	\$20 00	61	17	48¢	8 16
6-9	6-24	1	\$20 00	63	19	48¢	9 12
6-26	7-1	1	\$20 00	67	23	45¢	10 35
7-3	7-8	1	\$20 00	53½	9½	54¢	5 13
7-10	7-15	1	\$20 00	85	21	45¢	9 45
7-17	7-22	1	\$20 00	61½	17½	48¢	8 40
7-24	7-29	1	\$20 00	60	16	49¢	7 84
7-31	8-6	1	\$20 00	80	36	37½¢	13 50
8-7	8-12	1	\$20 00	61	17	48¢	8 16
8-14	8-19	1	\$20 00	70	26	42¢	10 92
8-21	8-26	1	\$22 50	63	19	53¢	10 07
9-5	9-10	1	\$22 50	60	16	56¢	8 96
9-11	9-16	1	\$22 50	60	16	56¢	8 96
9-18	9-23	1	\$22 50	62	18	54¢	9 72
9-25	9-30	1	\$22 50	58	14	57¢	7 98
10-2	10-7	1	\$22 50	61	17	55¢	9 35
10-9	10-14	1	\$22 50	61½	17½	54¢	9 45
10-16	10-21	1	\$22 50	62½	18½	54¢	9 99
10-23	10-28	1	\$22 50	60	18	56¢	10 08
10-30	11-4	1	\$22 50	61	19	65¢	10 45
11-6	11-11	1	\$22 50	57	15	58¢	8 70
11-13	11-18	1	\$22 50	63	21	53¢	11 13
11-20	11-25	1	\$22 50	59	17	57¢	9 69
11-27	12-2	1	\$22 50	50	8	67¢	5 36
12-4	12-9	1	\$22 50	61	19	55¢	10 45
12-11	12-17	1	\$22 50	67	25	50¢	12 50
12-18	12-23	1	\$22 50	69	27	48¢	12 96
12-26	12-31	1	\$22 50	68	26	49¢	12 74
1940							
1-15	1-20	1	\$22 50	57	15	58¢	8 70
1-22	1-27	1	\$22 50	62½	20½	54¢	11 07
1-29	2-3	1	\$22 50	54	12	61¢	7 32
2-5	2-10	1	\$22 50	60	18	56¢	10 08
2-12	2-17	1	\$22 50	61	19	55¢	10 45
2-19	2-24	1	\$22 50	63	21	54¢	11 34
2-26	3-2	1	\$22 50	68½	26½	50¢	13 25
3-4	3-9	1	\$22 50	64½	22½	52¢	11 70
3-11	3-16	1	\$22 50	60	18	56¢	10 08
[fol. 18]							
3-18	3-23	1	\$22 50	60½	18½	55¢	10 17
3-25	3-30	1	\$22 50	72	30	46¢	13 80
4-1	4-6	1	\$22 50	66	24	51¢	12 24
4-8	4-13	1	\$22 50	66	22	51¢	12 24
4-15	4-20	1	\$22 50	65	23	52¢	11 96
4-22	4-27	1	\$22 50	62½	20½	54¢	11 07
4-29	5-4	1	\$22 50	63½	21½	54¢	11 61
5-6	5-11	1	\$22 50	67	25	50¢	12 50
5-13	5-18	1	\$22 50	64	22	52¢	11 44
5-20	5-25	1	\$22 50	62½	20½	54¢	11 07
5-27	6-1	1	\$22 50	64½	22½	52¢	11 70
6-3	6-8	1	\$22 50	64½	22½	52¢	11 70
6-10	6-15	1	\$22 50	65	23	52¢	11 96

Date	Weeks	Weekly Wage	Hours Worked	Hours O. T.	Time and at Half Time	Amount Due
1940						
6-17 6-22	1	\$22.50	62	20	54¢	10.80
6-24 6-29	1	\$22.50	66½	24½	50¢	12.75
7-1 7-6	1	\$22.50	54	12	61¢	7.32
7-8 7-13	1	\$22.50	68	23	52¢	11.96
7-15 7-20	1	\$22.50	69	27	48¢	12.96
7-22 7-27	1	\$22.50	66½	24½	50¢	12.75
7-29 8-4	1	\$22.50	73½	31½	45¢	14.17
8-5 8-10	1	\$22.50	70½	28½	48¢	13.68
8-12 8-17	1	\$22.50	61	19	55¢	10.45
8-19 8-23	1	\$22.50	54	12	61¢	7.32
9-3 9-7	1	\$22.50	54	12	61¢	7.32
9-9 9-14	1	\$22.50	64½	22½	52¢	11.70
9-16 9-21	1	\$22.50	65½	23½	51½¢	11.98
9-23 9-28	1	\$22.50	62½	20½	54¢	11.07
9-30 10-5	1	\$22.50	64½	22½	52¢	11.70
10-7 10-12	1	\$22.50	63	21	54¢	11.34

Total Amount O. T. \$910.47

Plaintiff, W. J. Bayley, by way of explaining the above table or tabulation states that the number of hours worked each week divided into the weekly wage constitute the hourly wage and that hourly wage at the rate of one and one-half times the regular rate constitutes the over-time to which he is entitled unless the same is less than the minimum wage provided for by said Fair Labor Standards Act in which event one and one-half times the minimum wage is used and that this same method has been used in the computation of over-time for all the above named plaintiffs.

Plaintiff, W. J. Bayley alleges that the above table or tabulation correctly sets out the date of his employment, the hours worked each week, the wage received, the number of hours over-time to which he is entitled and the rate therefor and the amount due him therefor and that [fol. 19] the same is just, true and correct and no part thereof has been paid and that he is entitled to the said sum of \$910.47, and should have judgment therefor together with an equal amount for penalty together with attorney fees to be allowed his attorneys and all costs as provided for by Fair Labor Standards Act.

The above named plaintiffs each allege that they as employees of the said defendant each worked the periods of time alleged for each respectively in the tables incorporated in and made a part of this complaint; plaintiffs each allege also that each plaintiff has worked additional time overtime in the employ of the defendant, performing

the duties and activities specifically set forth in paragraph "1" of the plaintiff's complaint, for which time plaintiffs have no complete records. Plaintiffs therefore ask that the defendant be required to bring into Court complete records of all the time worked by each plaintiff while in the employment of the defendant, and plaintiffs pray that they be allowed such additional sums of money as the proof may show them to be entitled to recover under the provisions of the Fair Labor Standards Act.

Wherefore:

Plaintiff J. W. Bayley prays judgment against said defendant for \$1070.29, together with an additional equal amount as liquidated damages, together with fees for his attorneys and all costs of this action by him expended.

Plaintiff Henry V. Bloom prays that he have judgment against the said defendant for the sum of \$240.35, together with an additional equal amount as liquidated damages, together with fees for his attorneys and all costs of this action by him expended.

Plaintiff G. C. Kendall prays that he have judgment against said defendant for \$939.60, together with an equal additional amount as liquidated damages, together with fees for his attorneys and all costs of this action by him expended.

Plaintiff Owen Reding prays that he have judgment against the defendant for \$948.03, together with an equal additional amount as liquidated damages, together with fees for his attorneys and all costs of this action by him expended.

[fol:20] Plaintiff W. J. Bayley prays that he have judgment against the defendant for \$910.47, together with an additional equal amount as liquidated damages together with fees for his attorneys and all costs of this action by him expended.

Plaintiffs further pray that they have additional judgments for such amounts as defendant's records may show them entitled to under the Fair Labor Standards Act.

J. W. Bayley, Henry V. Bloom, G. C. Kendall, Owen Reding, W. J. Bayley, Jameson & Jameson, First National Bank Building, Fayetteville, Arkansas, Attys. for Plaintiffs, J. S. Jameson.

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT TO DISMISS OR IN THE ALTERNATIVE
FOR OTHER RELIEF—Filed January 23, 1942

Comes now the above named defendant and moves the Court to dismiss the claims of the several plaintiffs in this action upon the following grounds and for the following reasons to-wit:

1. The claim of the plaintiff, J. W. Bayley, for the reason that the complaint filed herein fails to state a claim upon which relief can be granted in favor of the plaintiff, J. W. Bayley and against this defendant.

2. The claim of the plaintiff, Henry V. Bloom, for alleged overtime under the Fair Labor Standards Act, for the reason that the complaint fails to state a claim upon which relief can be granted in favor of the plaintiff, Henry V. Bloom, for the recovery of such alleged overtime.

3. The claim of the plaintiff, G. C. Kendall, for alleged overtime under the Fair Labor Standards Act, for the reason that the Complaint fails to state a claim upon [fol. 21] which relief can be granted in favor of the plaintiff, G. C. Kendall, for the recovery of such alleged overtime.

4. The claim of the plaintiff, Owen Reding, for alleged overtime under the Fair Labor Standards Act, for the reason that the Complaint fails to state a claim upon which relief can be granted in favor of the plaintiff Owen Reding, for the recovery of such alleged overtime.

5. The claim of the plaintiff, W. J. Bayley, for the reason that the Complaint fails to state a claim upon which relief can be granted in favor of the plaintiff, W. J. Bayley, and against this defendant.

6. This defendant states to the Court that the plaintiffs, Henry V. Bloom, G. C. Kendall and Owen Reding, and each of them, in addition to asserting alleged claims for overtime under the Fair Labor Standards Act, also alleges, as a part and parcel of the claim asserted by them, and each of them, in the Complaint filed in this cause, claims for the recovery of wages below the minimum wage prescribed by the Fair Labor Standards Act, which alleged claim for minimum wages is not set forth in a separate or distinct count in the Complaint of said plaintiffs. In the

event the Court is of the opinion, because of the intermingling of said claims for overtime and for alleged failure to pay the minimum wage, that the Motion to Dismiss cannot be properly determined as to said last above named plaintiffs; then and in that event this defendant moves, in the alternative, that all allegations in the Complaint by the plaintiffs, Henry V. Bloom, G. C. Kendall and Owen Reding, and each of them, for the recovery of alleged overtime under the Fair Labor Standards Act be stricken from the Complaint pursuant to Rule 12(f) of the Rules of Civil Procedure for the District Courts of the United States, for the reason that said allegations are immaterial and neither state nor tend to state any claim on behalf of said plaintiffs, or either of them, or if the Court should be of the opinion that the same should not be stricken, that then and in that event, judgment be entered against said plaintiffs, and each of them, and in favor of this defendant, as to their respective claims for the recovery of alleged overtime under said Fair Labor Standards Act, pursuant to the provisions of Rule 54(b) or Rule 56(b) of the Rules of [fol. 22] Civil Procedure for the District Courts of the United States.

C. H. Rosenstein, 504 Atlas Life Building, Tulsa, Oklahoma. Price Dickson, 10½ E. Center Street, Fayetteville, Arkansas, Attorneys for Defendant. Rosenstein & Gore, 504 Atlas Life Building, Tulsa, Oklahoma, Of Counsel.

MEMORANDUM OPINION OF DISTRICT COURT ON SUSTAINING OF MOTION OF DEFENDANT TO DISMISS—Filed February 27, 1942.

United States District Court, Eighth Circuit, Western District of Arkansas

Chambers of John E. Miller, Judge.

Fort Smith, Ark.,

[fol. 23]

February 27, 1942.

Messrs. Rosenstein & Gore, 504 Atlas Life Building, Tulsa, Oklahoma. Mr. Price Dickson, 10½ East Center Street, Fayetteville, Arkansas. Messrs. Jameson & Jameson, First National Bank Building, Fayetteville, Arkansas.

In Re: J. W. Bayley, et al. v. Southland Gasoline Co.
Civil Action No. 29, Fayetteville Division.

Gentlemen:

The complaint alleges that the defendant was on and since October 24, 1938, engaged in interstate commerce and that plaintiffs were each employed by the defendant as truck drivers and that each plaintiff in that capacity drove defendant's truck each week from Arkansas to Oklahoma and from Oklahoma to Arkansas; that as such employees of the defendant they were each engaged in interstate commerce and in producing goods for interstate commerce and within the terms of the Fair Labor Standards Act of 1938; that the defendant was engaged in interstate commerce within the meaning of said Fair Labor Standards Act as a private carrier.

The plaintiff, J. W. Bayley, seeks to recover overtime compensation in the sum of \$1070.29, together with an equal amount as liquidated damages.

The plaintiff, Henry V. Bloom, seeks to recover overtime compensation in the sum of \$148.50, together with an equal amount as liquidated damages.

The plaintiff, G. C. Kendall, seeks to recover overtime compensation in the sum of \$928.80, together with a like amount as liquidated damages.

Plaintiff, Owen Redding, seeks to recover overtime compensation in the sum of \$885.23, together with a like amount as liquidated damages.

[fol. 24] Plaintiff, W. J. Bayley, seeks to recover overtime compensation in the sum of \$910.47, together with a like amount as liquidated damages.

Each of the above named plaintiffs seek to recover a reasonable attorney's fee, and the above claims are based upon Section 7 of the Fair Labor Standards Act of 1938.

The plaintiffs, Henry V. Bloom, G. C. Kendall and Owen Redding, each seek to recover amounts which they claim to be due as minimum wages under Section 6 of the Fair Labor Standards Act.

The defendant has filed a motion to dismiss the complaint as to the plaintiffs, J. W. Bayley and W. J. Bayley, and that portion of the complaint of the plaintiffs, Henry V. Bloom, G. C. Kendall and Owen Redding, which is based upon Section 7 of the Fair Labor Standards Act and which seeks to recover for overtime compensation.

No question is raised by the motion as to that part of the complaint of the plaintiffs, Henry V. Bloom, G. C.

Kendall and Owen Redding, based upon Section 6 of the Fair Labor Standards Act, or the claim for minimum compensation.

The questions presented by the motion have been thoroughly and ably briefed by respective counsel.

On May 1, 1940, the Interstate Commerce Commission exercised the power given it under Section 204 of the Motor Carrier Act of 1935, and, in effect, prescribed maximum hour regulations for drivers of trucks employed by private carriers. Under the terms of the order made by the Interstate Commerce Commission in that proceeding, the regulations became effective October 15, 1940.

Counsel for plaintiffs have stated the question involved herein as follows:

"Did the Interstate Commerce Commission have power to prescribe qualifications and maximum hours of service for the employees of the Southland Gasoline Company, a private carrier, during the interim of time during October 24, 1938 and October 15, 1940, pursuant to the provisions of Section 204 of the Motor Carrier Act?"

Able counsel also frankly state that if the Interstate Commerce Commission did, in fact, have the power to [fol. 25] prescribe such qualifications and maximum hours of service for said employees during that period of time, then the motion to dismiss should be granted.

The plaintiffs contend that under the provisions of Section 204 of the Motor Carrier Act, 49 U. S. C. A., Section 304, that the clause "if need therefor is found", appearing in A-3 of said Section is a condition precedent to the exercise of the power granted the Interstate Commerce Commission by the Act, and they argue that the power to regulate contract and common carriers granted in the same section is absolute and that the Congress by inserting the clause, "if need therefor is found", in the Act dealing with private carriers, intended to make that requirement a condition precedent to the exercise of the power to regulate.

I think the adjudicated cases settle the question against the contention of the plaintiffs.

The Congress delegated to the Interstate Commerce Commission the power to make regulations and to prescribe qualifications and maximum hours of service of employees of private carriers. This Act was passed in 1935. Ap-

proximately three years later the Congress sought to further protect employees engaged in interstate commerce by passing the Fair Labor Standards Act, but did not intend to set up two separate and distinct agencies to administer such laws and, therefore, having theretofore given the power to the Interstate Commerce Commission to prescribe qualifications and maximum hours for employees of carriers, common, contract and private, it specifically exempted such employees from the operation of the Fair Labor Standards Act.

The clause, "if need therefor is found", is not a condition precedent to the application of the Motor Carrier Act. No doubt this clause was inserted in the Act by the Congress because it was thought that private carriers operated under different conditions than contract and private carriers, but nevertheless the power to regulate existed. That power was not given to the Administrator of the Fair Labor Standards Act, and in order to settle the question Section 13 (b) was inserted in the Fair Labor Standards Act.

Therefore, the motion to dismiss is sustained and attorneys for defendant will draft an appropriate order, submit the same to attorneys for plaintiff for approval as [fol. 26] to form and send the same to the clerk of this court for presentation to me for signing and entry.

Sincerely yours, Jno. E. Miller.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING DEFENDANT'S MOTION TO DISMISS AND DISMISSING COMPLAINT AS TO ALL CLAIMS OF PLAINTIFFS.

Entered March 5, 1942

On the 17th day of February, 1942, this cause came on for hearing pursuant to assignment upon defendant's Motion to Dismiss.

Plaintiffs appears by their attorneys, Jameson & Jameson and defendant appears by its attorney, C. H. Rosenstein (Price Dickson of counsel). The Court having heard argument of counsel, requested that briefs be filed and the motion was taken under advisement.

The Court having considered the briefs filed by counsel for the respective parties and being fully advised finds that defendant's Motion to Dismiss should be sustained

as to the entire claims of the plaintiffs, J. W. Bayley and W. J. Bayley, and as to the claims of the plaintiffs, Henry V. Bloom, G. C. Kendall and Owen Redding insofar as each of said plaintiffs claim overtime compensation pursuant to Section 7 of the Fair Labor Standards Act of 1938.

It is, therefore, ordered, adjudged and decreed that defendant's Motion to Dismiss heretofore filed in this cause be and the same hereby is granted and sustained and the complaint heretofore filed in this cause be and the same hereby is dismissed as to the respective claims of the plaintiffs as follows to-wit:

1. All claims asserted in said complaint by the plaintiff, J. W. Bayley.

2. All claims of the plaintiff, Henry V. Bloom, for the recovery of overtime compensation pursuant to Section 7 of the Fair Labor Standards Act together with the claim of said plaintiff for an equal amount as liquidated damages. The amount so claimed by Henry V. Bloom as overtime [fols. 27-33] compensation, being the sum of One Hundred forty-eight and 50/100 Dollars (\$148.50).

3. All claims of the plaintiff, G. C. Kendall, for the recovery of overtime compensation pursuant to Section 7 of the Fair Labor Standards Act together with the claim of said plaintiff for an equal amount as liquidated damages. The amount so claimed by G. C. Kendall as overtime compensation, being the sum of Nine hundred twenty-eight and 80/100 Dollars (\$928.80).

4. All claims of the plaintiff, Owen Redding, for the recovery of overtime compensation pursuant to Section 7 of the Fair Labor Standards Act together with the claim of said plaintiff for an equal amount as liquidated damages. The amount so claimed by Owen Redding as overtime compensation, being the sum of Eight hundred eighty-five and 23/100 Dollars (\$885.23).

5. All claims asserted in said complaint by the plaintiff, W. J. Bayley.

The defendant is granted ten (10) days from February 27, 1942, to file its responsive pleading to the claims of the plaintiffs, Henry V. Bloom, G. C. Kendall and Owen Redding for recovery of minimum compensation under Section 6 of the Fair Labor Standards Act.

To the action of the Court in sustaining defendant's motion to dismiss plaintiffs' complaint as to its claim therein for overtime compensation under Section 7 of the Fair Labor Standards Act, plaintiffs except, and pray for an appeal to the Circuit Court of Appeals.

This March 5, 1942.

Jno. E. Miller, District Judge.

[fol. 34] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION—September 12, 1942

This cause having been called for hearing in its regular order and counsel not appearing for either party to make oral argument, the same is thereupon taken by the Court as submitted on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 12,309—November Term, A. D. 1942

J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL, OWEN
REDING and W. J. BAYLEY, Appellants,

VS.

SOUTHLAND GASOLINE COMPANY, Appellee

Appeal from the District Court of the United States for the
Western District of Arkansas

Mr. J. S. Jameson and Mr. Paul Jameson submitted brief
for Appellant.

Mr. C. H. Rosenstein and Mr. Price Dickson submitted
brief for appellee.

Before Gardner, Woodrough, and Riddick, Circuit Judges

OPINION—November 2, 1942

Riddick, Circuit Judge, delivered the opinion of the court.

Appellants were employed by appellee for various periods
between October 24, 1938 and May 11, 1941, as motor truck
[fol. 36] drivers. Their duties required them to drive trucks

between points in Oklahoma and points in Arkansas, in the transportation and delivery of materials purchased and sold by appellee. They brought this action against appellee under the Fair Labor Standards Act of 1938, to recover for each of them either unpaid minimum wages and overtime compensation, or both, and additional equal amounts as liquidated damages, and for costs and attorneys' fees. The appellee moved to dismiss that part of the complaint seeking recoveries for overtime compensation under § 7 of the Fair Labor Standards Act (29 U. S. C. A. § 207). The motion was granted, the District Court being of the opinion that the appellants were not within the protection of the Fair Labor Standards Act with respect to maximum hours of employment and overtime compensation, because of the exemption contained in § 13 (b) of the Act (29 U. S. C. A. § 213), providing that the provisions of § 7 shall not apply "with respect to any employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service, pursuant to § 204 of the Motor Carrier Act." This appeal brings in question the correctness of the Court's action.

It is conceded that the Interstate Commerce Commission did not undertake the regulation of private motor carriers until May 1, 1940, when it made its finding that their regulation was needed. The District Court considered this fact unimportant, holding that the power of the Commission to regulate private carriers was not dependent upon a prior finding by the Commission that such regulation was necessary. The Court was of the opinion that the Commission had power to fix maximum hours of service of employees of private carriers from the date of the passage of the Motor Carrier Act of 1935 and that, for this reason, the provisions of the Fair Labor Standards Act were not applicable to the [fol. 37] appellants in this case. If, on the other hand, the Commission was without power, prior to its finding on May 1, 1940, to regulate the maximum hours of service of truck drivers of private carriers, it is evident that the appellants here were not deprived of the benefits of the Fair Labor Standards Act by anything in the exemption in § 13 (b) of that Act.

The relevant provisions of the Motor Carrier Act are:

"(a) *Powers and duties generally.* It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administrations of sections 304 (c), 305, 320, 321, 322 (a), (b), (d), (f), and (g), and 324 of this chapter."

[fol. 38] It is apparent from a reading of the Motor Carrier Act that while the Congress determined for itself the necessity for the regulation of common and contract carriers by motor vehicle in the respects stated in the Act, it did not determine the necessity of regulating private carriers by motor vehicle, such as the appellee here, but left the determination of that question to the Interstate Commerce Commission, if, in the words of the Act, "need therefor is found." Obviously the three subsections of the Act, read together, clearly imply the intention of Congress that the power of the Commission with respect to private carriers should depend upon a finding by the Commission that the regulation was needed; that is to say, needed in the public interest in order to make effective regulation of common and contract carriers which Congress commanded, and to protect the public and the common and contract carriers from the consequences of unregulated competition by private carriers.

The rule is that where the legislature invests an administrative body or other agency of the government with power to act on or in accordance with a hearing or a finding, the delegated power does not come into existence until the hearing is had or the determination is made. In such circumstances a finding is jurisdictional and action without the finding is void. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 431, 55 Sup. Ct. 241, 79 L. Ed. 446; *United States v. B. & O. Ry. Co.*, 293 U. S. 454, 462, 55 Sup. Ct. 268, 79 L. Ed. 587; *Mahler v. Eby*, 264 U. S. 32, 44 Sup. Ct. 283, 68 L. Ed. 549; *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 43 Sup. Ct. 55, 67 L. Ed. 112.

Moreover, as this Court pointed out in *Fleming v. Hawkeye Pearl Button Co.*, 8 Cir., 113 F. 2d 52, the Fair Labor Standards Act is remedial and must be liberally construed. [fol. 39] And see *United States v. Darby*, 312 U. S. 100, 61 Sup. Ct. 451, 85 L. Ed. 609. The obvious purpose of the Act is to include within its protection every employee engaged in interstate commerce or in the production of goods for interstate commerce, except those specifically excepted. *Bowie v. Gonzalez*, 1 Cir., 117 F. 2d 11. The section dealing with exemptions may not be given an interpretation which would lead to results contrary to the evident scope and purpose of the Act. And we think the interpretation contended for by appellee would produce that result. Under the Motor Carrier Act of 1935, the Commission was free to decide the question of the necessity of the regulation of private carriers either way. It might have found that the necessity did not exist. In the event of such a finding, the employees of private motor carriers, under the holding of the District Court, would be without the protection of either Act. They would constitute a class of employees in interstate commerce excepted from any regulation whatsoever, a result clearly incompatible with the obvious intent and purpose of the Fair Labor Standards Act.

We hold that until the Interstate Commerce Commission made the finding of the necessity of the regulation of private carriers with respect to the matters specified in the Motor Carrier Act of 1935, it was without power to prescribe either qualifications or maximum hours for the employees of such carriers. This holding agrees with the interpretation placed upon the Fair Labor Standards Act by the Administrator in his Interpretative Bulletin No. 9.

and with the interpretation of the Motor Carrier Act by the Interstate Commerce Commission, implied from the fact that it did not undertake the regulation of private motor carriers until it had made a finding that such regulation was necessary. Such interpretations by the agencies charged with the administration of the Acts are entitled to [fol. 40] great weight. *United States v. American Trucking Associations*, 310 U. S. 534, 60 Sup. Ct. 1059, 84 L. Ed. 1345; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 324, 325, 53 Sup. Ct. 350, 77 L. Ed. 796. In this case they are undoubtedly correct.

Accordingly the judgment of the District Court is reversed and this case is remanded for further proceedings in conformity with this opinion.

[fols. 41-43] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 12309—November Term, 1942

J. W. BAILEY, HENRY V. BLOOM, G. C. KENDALL, OWEN
REDING, and W. J. BAYLEY, Appellants,

VS.

SOUTHLAND GASOLINE COMPANY

JUDGMENT—November 2, 1942

Appeal from the District Court of the United States for the
Western District of Arkansas

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that J. W. Bayley, Henry V. Bloom, G. C. Kendall, Owen Reding, and W. J. Bayley have and recover against the Southland Gasoline Company the sum of.— Dollars for their costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that this cause, be, and the same is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court filed herein.

November 2, 1942.

[fol. 44] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES, OCTOBER
Term, 1942

No. 581

ORDER ALLOWING CERTIORARI—Filed January 18, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is Granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 46] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION TO OMIT CERTAIN MATTERS FROM THE PRINTED
RECORD—Filed January 30, 1943

Come now the undersigned, Counsel of Record for Petitioner and Counsel of Record for Respondents, and show to the Court that pursuant to Paragraph 8 of Rule 38 they do hereby stipulate to omit from the Printed Record the following matters not essential to a consideration of the questions presented by the Petition for Writ of Certiorari to-wit:

1. Notice of Appeal and Notice to Counsel for Appellee of filing Notice of Appeal. (Tr. fol. 1 and 2, pp. 1-2.)
2. Certificate of Service. (Tr. fol. 27, p. 22.)
3. Bond for Costs on Appeal. (Tr. fol. 34, 35 and 36, pp. 27-29.)

4. Designation of Record on Appeal and Exhibit "A" Statement of Points To Be Relied Upon on Appeal. (Tr. fol. 37 and 38, pp. 30-31.)

5. Order Extending Time For Docketing Record on Appeal. (Tr. fol. 39, p. 31.)

6. Clerk's Certificate to Transcript. (Tr. fol. 40, pp. 31-32.)

7. Appearances of Counsel in the United States Circuit Court of Appeals, Eighth Circuit. (Tr. fol. 33 and 34, p. 33.)

8. Motion of Appellee to Stay Issuance of Mandate, including Certificate of Counsel and Certificate of Service and Order Staying Issuance of Mandate. (Tr. fol. 42 and 43, pp. 40-41.)

[fol. 47] Witness the signatures of counsel for Petitioner and of counsel for Respondents, this 28 day of January, 1943.

Claude H. Rosenstein, Counsel for Petitioner. J. S. Jameson, Counsel for Respondents.

Endorsed on Cover: Enter Claude H. Rosenstein. File No. 47082. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 581. Southland Gasoline Company, Petitioner, vs. J. W. Bayley, Henry V. Bloom, G. C. Kendall, et al. Petition for writ of certiorari and exhibit thereto. Filed December 10, 1942. Term No. 581 O. T. 1942.

No
554

In the Supreme Court of the United States

October Term, 1942.

SOUTHLAND GASOLINE COMPANY, *Petitioner,*

vs.

**J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL,
OWEN REDING AND W. J. BAYLEY, *Respondents.***

**Petition for Writ of Certiorari, and Brief in
Support Thereof.**

CLAUDE H. ROSENSTEIN,

Tulsa, Oklahoma,

Attorney for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1942.

No.

SOUTHLAND GASOLINE COMPANY, *Petitioner,*

vs.

**J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL,
OWEN REDING AND W. J. BAYLEY, *Respondents.***

**PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT.**

To the Honorable the Supreme Court of the United States:

Your petitioner, Southland Gasoline Company, respectfully shows:

I.

Summary Statement of the Matter Involved.

(a) This suit is a civil action filed January 2, 1942, (Tr., p. 2) by respondents, as plaintiffs, against petitioner, as defendant, in the District Court of the United States for the Western District of Arkansas.

The complaint filed in the District Court (Tr., pp. 2-20) alleged that the respondents were employees of the petitioner; that petitioner during the period of time between

October 24, 1938, and October 15, 1940, was engaged in the gasoline business and in pursuance of that business purchased gasoline, automobile tires, batteries and automobile accessories in the State of Oklahoma and caused these articles to be loaded upon petitioner's trucks and transported to the State of Arkansas where petitioner sold them, at wholesale, to retail establishments in the State of Arkansas, for resale to the general public; that petitioner each week loaded trucks in the State of Arkansas with automobile tires, accessories and automotive equipment and transported such articles to the State of Oklahoma where they were sold at wholesale to retail establishments in that state for resale to the general public; that petitioner in the conduct of its business operated and maintained trucks and engaged in trucking operations as "a private carrier"; that during all such time each of respondents was employed by petitioner as a truck driver and each respondent, in this capacity, drove petitioner's trucks each week from Arkansas to Oklahoma and from Oklahoma to Arkansas, which trucks were used by petitioner in carrying on its gasoline business. Respondents further alleged failure on the part of the petitioner to pay each of the respondents time and one-half for services performed by them as such truck drivers in excess of the maximum hours provided by the Fair Labor Standards Act.

Certain of the respondents (Henry V. Bloom, G. C. Kendall, and Owen Reding) also alleged a failure to pay the minimum wage provided by Section 6(a) of the Fair Labor Standards Act (Tit. 29, Sec. 206(a), U. S. C. A., 52 Stat. 1062). The claim of these respondents to recover minimum wages pursuant to Section 6(a) of the Fair Labor Standards Act, however, was not in controversy on the appeal to the Circuit Court of Appeals. The order of the District Court (Tr., pp. 26-27) from which the appeal was

prosecuted to the Circuit Court of Appeals for the Eighth Circuit, sustained petitioner's motion to dismiss the complaint of respondents as to their claim for overtime compensation under Section 7(a) of the Fair Labor Standards Act.

(b) The District Court held (Tr., pp. 22-26) that respondents were not entitled to the benefits of Section 7(a) of the Fair Labor Standards Act (Tit. 29, Sec. 207(a), U. S. C. A., 52 Stat. 1063) because they were included within the exemption granted by Section 13(b)(1) of the Fair Labor Standards Act, (Tit. 29, Sec. 213(b)(1), U. S. C. A., 52 Stat. 1067) exempting any employee "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions" of the Motor Carrier Act.

(c) The respondents, as appellants, prosecuted an appeal from the decision and judgment of the District Court to the Circuit Court of Appeals for the Eighth Circuit, which court reversed the judgment and decision of the District Court. The appeal involved a construction of Sections 7(a) and 13(b) of the Fair Labor Standards Act and Section 204 of the Motor Carrier Act (Tit. 49, Sec. 304, U. S. C. A., 49 Stat. 546). The Circuit Court of Appeals held and decided (Tr., pp. 34-39) that the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act, 1938, did not apply to employees of private carriers until the Interstate Commerce Commission made a finding (on May 1, 1940) of the necessity for regulation of private carriers with respect to the matters specified in the Motor Carrier Act, 1935.

(d) A certified transcript of the record of said case in the Circuit Court of Appeals for the Eighth Circuit, including the proceedings in that court, accompanies this petition.

II.

Basis Upon Which It Is Contended This Court Has Jurisdiction to Review the Judgment or Decree in Question.

(a) The decision of the Circuit Court of Appeals for the Eighth Circuit holding that the exemption granted by Section 13(b)(1) of the Fair Labor Standards Act of 1938 was not applicable to respondents until the Interstate Commerce Commission made a finding (May 1, 1940) of the necessity for the regulation of private carriers of property by motor vehicle involves an important question of Federal law which has not been, but should be, settled by this court.

(b) The decision of the Circuit Court of Appeals for the Eighth Circuit holding that Section 13(b)(1) of the Fair Labor Standards Act did not exempt respondents from the provisions of said Act prior to May 1st, 1940, is a decision of a Federal question in a way probably in conflict with applicable decisions of this court.

(c) The decision of the Circuit Court of Appeals for the Eighth Circuit holding that the exemption provided by Section 13(b)(1) of the Fair Labor Standards Act of 1938 was not applicable to employees of private carriers of property by motor vehicle until May 1, 1940, is in conflict with the weight of authority and is contrary to uniform decisions of the District Courts in many of the circuits and the question has not been heretofore determined by any other Circuit Court of Appeals.

Wherefore, petitioner prays that a writ of certiorari issue under the seal of this court to the Circuit Court of Appeals for the Eighth Circuit commanding that court to certify and send to this court, on a day certain, therein to be designated, a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals for the

Eighth Circuit, had in the case numbered and entitled on its docket No. 12,309, *J. W. Bayley, Henry V. Bloom, G. C. Kendall, Owen Reding and W. J. Bayley, appellants, v. Southland Gasoline Company, appellee*, to the end that said cause may be reviewed and determined by this court, as provided by law, and that the judgment therein of the Circuit Court of Appeals for the Eighth Circuit be reversed by this court and for such further relief as to this Honorable Court may seem proper.

SOUTHLAND GASOLINE COMPANY,
Petitioner,

By **CLAUDE H. ROSENSTEIN,**
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(Emphases ours.)

The memorandum opinion of the District Court sustaining petitioner's motion to dismiss is found at pages 22-26 of the record; the order of the District Court sustaining the defendant's motion to dismiss is found at pages 26-27 of the record and the opinion and judgment of the Circuit Court of Appeals, not yet published, is found on pages 34-39 of the record.

Grounds for Jurisdiction of This Court.

The jurisdiction of this court is invoked pursuant to Tit. 28, Sec. 347(a), U. S. C. A. (26 Stat. 828, as amended by 36 Stat. 1157 and 43 Stat. 938), and the grounds upon which it is contended this court has jurisdiction to review the judgment and decision of the Circuit Court of Appeals are set forth under "II" of the preceding petition, which are hereby adopted and made a part of this brief.

Statement of the Case.

A statement of the matter involved has already been set forth in the petition, under "I," which is hereby adopted and made a part of this brief.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding and deciding that the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act (Tit. 29, Sec. 213(b)(1), U. S. C. A., 52 Stat. 1067), providing that Section 7 of the Fair Labor Standards Act (29 U. S. C. A., Sec. 207, 52

Stat. 1063) is not applicable to any employee "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service" pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935 (Title 49, Section 304(a)(3), U. S. C. A.), did not apply to respondents until May 1st, 1940, on which date the Interstate Commerce Commission found that a need existed for the regulation of private carriers of property by motor vehicle.

2. The Circuit Court of Appeals erred in holding and concluding that respondents by their complaint, stated a claim for the recovery of overtime compensation pursuant to the provisions of the Fair Labor Standards Act of 1938.

ARGUMENT.

PROPOSITION I.

(Specifications of Error 1 and 2.)

The Act is not applicable to respondents because of the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act of 1938.

The substantive issue presented to the Circuit Court of Appeals was:

Did the Interstate Commerce Commission have power to prescribe qualifications and maximum hours of service for employees of private carriers of property by motor vehicle from the effective date of the Motor Carrier Act of 1935, or did that power not come into existence until May 1, 1940, on which date the Interstate Commerce Commission (*ex parte* No. MC-3, Div. No. 5—Interstate Commerce Commission) determined that a need existed for regulation,

by the Commission, of private motor carriers engaged in interstate or foreign commerce?

The decision of the Circuit Court of Appeals, in our judgment, is bottomed on an erroneous conclusion on this question. Its correct solution determines whether the Circuit Court of Appeals rightly or wrongly decided.

It is the contention of petitioners, which contention, we believe, is supported by the great weight of authority, that the Interstate Commerce Commission *had power*, at all times subsequent to the approval of the Motor Carrier Act of 1935, to prescribe maximum hours of service and qualifications for the employees of private carriers of property by Motor vehicle; that the commission's right *to exercise* this power was based upon its finding of a need therefor, but that the *power* at all times existed. It is the further contention of petitioner that the exemption granted by Section 13(b)(1) of the Fair Labor Standards Act, of all employees with respect to whom the Interstate Commerce Commission *had power* under the Motor Carrier Act to establish qualifications and maximum hours of service included, at all times, such employees of private carriers of property by motor vehicle despite the fact that the Commission had not found the need *for the exercise* of this power and had not actually exercised the power so conferred upon it by the Motor Carrier Act, as to private carriers.

The Circuit Court of Appeals held the exemption of Section 13(b)(1) was not applicable to respondents solely and only because the Commission, at the time the Fair Labor Standards Act became effective, had not found and did not, until May 1, 1940, find that a need existed for the regulation of private carriers of property by motor vehicles.

The question determined by the Circuit Court of Ap-

peals for the Eighth Circuit in this case has not been decided, so far as we have been able to ascertain by diligent research, by any other Circuit Court of Appeals. The question has been determined by a substantial number of United States District Courts. Except for the decision of the Circuit Court of Appeals for the Eighth Circuit in this case the decisions are unanimous in holding that the exemption provided by Section 13(b)(1) applied at all times since the adoption of the Fair Labor Standards Act despite the fact that it was not until May 1, 1940, that the Interstate Commerce Commission found that a need existed for *the exercise* of the power granted it by Congress to regulate private carriers of property by Motor vehicle.

The following decisions sustain the contention of petitioner:

Faulkner v. Little Rock Furniture Mfg. Co., 32 F. Supp. 590 (D. C. E. D. Arkansas, April 9, 1940);

Bechtel v. Stillwater Milling Co., 33 F. Supp. 1010 (D. C. Western District Oklahoma, June 25, 1940);

Gerdert v. Certified Poultry & Egg Co., Inc., 38 F. Supp. 964 (D. C. Southern District, Florida, April 29, 1941);

West v. Smoky Mountains Stages, Inc., 40 F. Supp. 296 (D. C. N. D. Ga., August 5, 1941);

Gavril v. Kraft Cheese Co., (Fleming, Administrator of Wage and Hour Division, United States Department of Labor, Intervener), 42 F. Supp. 702 (D. C. N. D., Ill., November 27, 1941);

Robbins v. Zabarsky, 44 Fed. Supp. 867 (D. C., Mass., May 7, 1942);

Fitzgerald v. Kroger Grocery & Baking Co., 45 F. Supp. 812 (D. C., Kan., June 22, 1942);

Clarence Gibson v. Wilson & Company, 4 Labor Cases, #60,466 (D. C. W. D., Tennessee, March 20, 1941).

The gist of the above decisions is concisely stated in the fifth paragraph of the syllabus of *Gavril v. Kraft Cheese Co.*, (*Fleming, Administrator of Wage and Hour Division, United States Department of Labor; Intervener*) 42 F. Supp. 702 (D. C. N. D., Ill.), which reads:

“Under Fair Labor Standards Act providing that section limiting hours of work and defining rate of overtime compensation shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and Maximum hours of service under the Motor Carrier Act, driver-salesmen of employer engaged on a national scale in the manufacture and distribution at wholesale of cheese and other food products were excluded from the wage and hour provisions of the Fair Labor Standards Act *regardless of the time at which the Interstate Commerce Commission exercised its power to establish qualifications and maximum hours of service for such employees.*”

The decision of the Circuit Court of Appeals, is based in part on the authority of Interpretative Bulletin No. 9 (United States Department of Labor, Wage and Hour Division—Originally issued March, 1939). This bulletin states that it is the administrator's opinion that until an order is issued by the Interstate Commerce Commission, finding the need for regulation, “employees of private carriers should be considered as not within the exemption provided by Section 13(b)(1).” The following important preface to Interpretative Bulletin No. 9, however, should be considered. It reads:

"The scope of the exemption provided in Section 13(b)(1) involves the interpretation not only of the Fair Labor Standards Act but also of Section 204 of the Motor Carrier Act, 1935. *The act confers no authority upon the Administrator to extend or restrict the scope of the exemption provided in Section 13(b)(1) or even to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the course which the Administrator will follow in the performance of his administrative duties until otherwise required by authoritative ruling of the courts.*" (Par. 2, Int. Bull. No. 9)

The above statement is particularly enlightening when it is remembered that the Administrator intervened in the case of *Gavril v. Kraft Cheese Co.*, *supra*; that the court "otherwise" determined the interpretation of the exemption granted by Section 13(b)(1) in that case, and that no appeal was taken from that decision, but it was allowed to and has become final.

The Circuit Court of Appeals bases its opinion in part also on certain decisions of this court. The pertinent portion of the opinion of the Circuit Court of Appeals, including the citation of the cases relied upon, reads:

"The rule is that where the legislature invests an administrative body or other agency of the government with power to act on or in accordance with a hearing or a finding, the delegated power does not come into existence until the hearing is had or the determination is made. In such circumstances a finding is jurisdictional and action without the finding is void. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 431, 55 Sup. Ct. 241, 79 L. ed. 446; *United States v. B. & O. Ry. Co.*, 293 U. S. 454, 462, 55 Sup. Ct. 268, 79 L. ed. 587; *Mahler v. Eby*, 264 U. S. 32, 44 Sup. Ct. 283, 68 L. ed. 549; *Wichita Railroad &*

Light Co. v. Public Utilities Commission, 260 U. S. 48, 43 Sup. Ct. 55, 67 L. ed. 124."

The interpretation of the above cited decisions of this Honorable Court by the Circuit Court of Appeals is, in our humble judgment, in conflict with the decisions actually rendered by this Honorable Court in these cases and constitutes the decision of a Federal question in a way probably in conflict with applicable decisions of this court. The decisions of this court above referred to, instead of holding that where the Legislature invests an administrative body or other agency of the Government, with power to act on or in accordance with a hearing or a finding, the delegated power does not come into existence until the hearing is had or the determination is made, on the contrary hold that the power at all times exists in the administrative body or other agency of the Government, but that it is a condition to the exercise of this power that such finding or determination be made.

For instance, in *Mahler v. Eby*, *supra*, Mr. Justice TAFT in the court's opinion in that case said:

"It is essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise, and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act."

None of the above cases holds that power delegated by the Legislative Department, *to be exercised* on the finding of the existence of certain facts, is not at all times from and after the passage of the act vested in the Administrative body or other governmental agency, but they do hold that the power can only *be exercised* upon a proper finding of the

conditions under which the legislative branch of the Government has authorized the *power* to be exercised.

The fundamental fallacy of the decision of the Circuit Court of Appeals lies in the fact that the court confuses "power" with *the conditions under which that power may be exercised*. If the Fair Labor Standards Act of 1938 by the provisions of Section 13 (b) (1) had exempted employees as to whom the Interstate Commerce Commission *had prescribed* qualifications and maximum hours of service, then the decision of the Circuit Court of Appeals would be well founded, *but the act does not so define the exemption*.

The fact that by the terms of the Motor Carrier Act the Interstate Commerce Commission is not to *exercise its power* to prescribe qualifications and maximum hours of service for employees of private carriers of property by motor vehicle, until need therefor is found, *does not mean that the Interstate Commerce Commission was not at all times vested with such power*, any more than it can be properly said that a court of general equity jurisdiction does not at all times have *power* to appoint receivers because of the fact that the power to *make* such appointments will be exercised only when the court determines the existence of conditions or circumstances under which a need therefor exists.

The proper interpretation of the clause "if need therefor is found" is well expressed by District Judge Boyd in his findings of fact and conclusion of law, filed in the case of *Clarence Gibson v. Wilson & Company*, decided by him as Judge of the District Court for the Western Division of the Western District of Tennessee on March 20, 1941, 4 Labor Cases (Commerce Clearing House) No. 60,466. Conclusion of Law No. VII reads:

"The words 'if need therefor is found' in Section 204(a)(3) of the Motor Carrier Act, 1935, constitute a restriction and limitation upon the exercise by the Commission of the power granted to it to regulate maximum hours and qualifications of service of truck drivers of private carriers, but do not restrict or limit the power granted to the commission so to regulate the maximum hours and qualifications of service of such employees."

This court had occasion to consider the power of the Interstate Commerce Commission, under the Motor Carrier Act of 1935, to establish qualifications and maximum hours of service of employees of motor carriers, in the case of *United States v. American Trucking Associations*, 310 U. S. 534-553, 60 S. Ct. 1059, 84 L. ed. 1345. In that case it was held that the employees with respect to whom the Interstate Commerce Commission had power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935 were those employees whose duties affect safety of operation. (Respondents are all truck drivers and they are concededly employees whose duties affect safety of operation.) It is true that the decision of this court in *United States v. American Trucking Associations*, *supra*, was concerned only with employees of common and contract carriers by motor vehicle, but it also seems evident, from the opinion in that case, that the court concluded that the power of the Commission extended equally to employees of common, contract and private carriers. It was the contention of appellees in the *American Trucking Associations* case that the difference in language between Sub-Sections (1) and (2) and Sub-Section (3) of Section 204 of the Motor Carrier Act was indicative of a Congressional purpose to restrict the regulation of employees of private carriers to "safety of operation" while

giving broader authority as to employees of common and contract carriers. This court rejected that contention and in the course of its opinion, delivered by Mr. Justice REED, among other things, said:

"The Senate Committee's report explained the provisions of Sec. 204(a) (1), (2), 49 U. S. C. A., Sec. 304(a) (1), (2) as giving the Commission authority over common and contract carriers similar to that given over private carriers by Sec. 240(a) (3), 49 U. S. C. A., Sec. 304(a) (3)."

Again in the opinion in discussing an amendment to Section 203 of the Motor Carrier Act, providing an exemption of certain motor vehicles from the provisions of the Act, except the provisions of Section 204 thereof, this court said:

"It is evident that the exempted vehicles and operators include common, contract and private carriers."

We, therefore, believe the proper interpretation of this court's decision in *United States v. American Trucking Associations, supra*, leads to the conclusion that the power of the Interstate Commerce Commission to prescribe qualifications and maximum hours of service of "employees" extends alike to employees of common, contract and private carriers and that the only limitation upon the power of the Commission is that delineated by this court in the above mentioned decision, to-wit, that the power of the Commission is limited to employees whose duties affect safety of operation. It is true that the conditions under which the Commission may exercise its power as to employees of private carriers are restricted further by the fact that the Commission must find a necessity for such regulation, but this is not a limitation upon the Commission's power but a condition upon which the power may be exercised.

We, therefore, conclude that the Circuit Court of Appeals for the Eighth Circuit, by its decision in this case, erroneously concluded that respondents were not exempt from the overtime provisions of the Fair Labor Standards Act and that such judgment and decision should be reversed.

Respectfully submitted,

CLAUDE H. ROSENSTEIN,
Attorney for Petitioner.

No. 581

In the Supreme Court of the United States

October Term, 1942.

SOUTHLAND GASOLINE COMPANY, *Petitioner,*

vs.

**J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL,
OWEN REDING AND W. J. BAYLEY, *Respondents.***

**Memorandum, Supplementing Petition
for Writ of Certiorari.**

**CLAUDE H. ROSENSTEIN,
*Attorney for Petitioner.***

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1942.

No. 581

SOUTHLAND GASOLINE COMPANY, *Petitioner,*

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OWEN REDING AND W. J. BAYLEY, *Respondents.*

MEMORANDUM, SUPPLEMENTING PETITION FOR
WRIT OF *CERTIORARI*.

To the Honorable Supreme Court of the United States:

Your petitioner, Southland Gasoline Company, respectfully shows:

That its Petition for Writ of *Certiorari* was filed in this Court on the 10th day of December, 1942. That at the time of the filing of such petition the decision of the Circuit Court of Appeals for the Eighth Circuit, in the instant case, was the only decision of a Circuit Court of Appeals determining the question which petitioner seeks herein to have reviewed by this Honorable Court.

Petitioner now shows to the Court that on December 26th, 1942, the United States Circuit Court of Appeals for the Fourth Circuit decided the case of *Richardson v. The James Gibbons Company*, No. 4964 on the docket of that court. That the United States Circuit Court of Appeals

for the Fourth Circuit in *Richardson v. The James Gibbons Company* rendered a decision in conflict with the decision of the Eighth Circuit Court of Appeals in this action.

That the opinion of the Circuit Court of Appeals for the Fourth Circuit has not yet been officially reported but a copy of said opinion is attached to this Supplemental Memorandum as an appendix hereto and made a part hereof. That the Circuit Court of Appeals for the Fourth Circuit in its opinion in *Richardson v. The James Gibbons Company* expressly considers the decision of the Circuit Court of Appeals for the Eighth Circuit in the instant case and concludes that the decision of the Circuit Court of Appeals for the Eighth Circuit is incorrect. Speaking of the decision of the Eighth Circuit Court of Appeals in the instant case the Fourth Circuit Court of Appeals in its opinion in *Richardson v. The James Gibbons Company* says:

“With all due deference, and all proper respect, for the learning and authority of that court, we, regretfully, cannot concur in the correctness of its decision or in the validity of the reasons advanced for that decision. We think the interpretation given in the *Bayley* case to the Fair Labor Standards Act and the Motor Carrier Act overlooks the keen interrelation of these two statutes and defeats the intents and purposes which Congress had in mind.”

Petitioner, therefore, suggests, in view of the decision of the Circuit Court of Appeals for the Fourth Circuit rendered since the Petition for Writ of *Certiorari* was filed in this case, that this Court should grant a writ of *certiorari* herein, for the further reason (in addition to the reasons stated in the petition heretofore filed) that the decision of the Circuit Court of Appeals for the Eighth Circuit in this case is in conflict with the decision of the Circuit Court of

Appeals for the Fourth Circuit on the same matter or question, to-wit, the decision of the Fourth Circuit Court of Appeals in cause No. 4964; *Wilson W. Richardson, Appellant, versus The James Gibbons Company, a Body Corporate, Appellee*, decided December 26, 1942.

Respectfully submitted,

SOUTHLAND GASOLINE COMPANY,

Petitioner,

By CLAUDE H. ROSENSTEIN,

Attorney for Petitioner.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 4964

WILSON W. RICHARDSON, APPELLANT,

VERSUS

THE JAMES GIBBONS COMPANY, A BODY CORPORATE,
APPELLEE.

Appeal from the District Court of the United States for the
District of Maryland, at Baltimore.

(Argued November 12 and 21, 1942; decided December 26, 1942.) Before Parker, Sopher, and Dobie, Circuit Judges. George A. Mahonie (Wylie L. Ritchey on brief) for appellant; and O. Bowie Duckett, Jr., (Edward E. Hargest, Jr., and Alexius McGlannan, 3rd, on brief) for appellee.

DOBIE, Circuit Judge:

This was a civil action instituted by Wilson Richardson (hereinafter called Richardson) as plaintiff, against The

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James Gibbons Company (hereinafter called Gibbons) as defendant, for alleged overtime compensation, for liquidated damages, and also for a reasonable attorney's fee. These claims were all based on the provisions of Section 16(b) of the Fair Labor Standards Act (Act of June 25, 1938, 29 U. S. C. A., Sec. 201, et seq.).

The District Judge sustained a motion of the defendant Gibbons to dismiss the action, holding that Richardson was not within the scope of the Fair Labor Standards Act by virtue of the terms of Section 13(b) of the Act (29 U. S. C. A., Sec. 213) which reads:

"The provisions of Section 207 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualification and maximum hours of service pursuant to the provisions of Section 304 of Title 49; . . ."

Under the stipulation of facts filed in this case, "Richardson was employed by the Defendant Company from October 24, 1938, to September 4, 1940, as a distributor-operator and a truck driver. His duties consisted of distributing and hauling asphalt." Again, under the stipulation, according to the testimony of Richardson, he was employed, during the period in question "twenty-five per cent of the time as a truck driver and seventy-five per cent of the time as a distributor-operator"; while, according to the testimony of defendant, Richardson "was employed approximately thirty per cent of the time in distributing the asphalt and seventy per cent in transporting same."

The pertinent portions of the Motor Carrier Act are:

"Sec. 204(a). It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of ac-

counts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment."...

In *United States v. American Trucking Association*, 310 U. S. 534, it was held that Section 204(a) of the Motor Carrier Act applied only to those employees whose duties affect the safety of operation. We agree with the District Judge, in the instant case, that the duties of Richardson did affect the safety of operation. See *Faulkner v. Little Rock Manufacturing Co.*, 32 F. Supp. 590; *Bechtel v. Stillwater Milling Co.*, 33 F. Supp. 1010; *West v. Mountain Stages*, 40 F. Supp. 296; *Robbins v. Zabarsky*, 44 F. Supp. 867. See also, 130 A. L. R. 272, 132 A. L. R. 1443.

Nor are we impressed by Richardson's contention that "whatever driving of the truck, or trucks (upon which the Distributor Tank and Mechanism were mounted) that he did was but *incidental* to his main employment of 'Distributor-Operator'" and that, therefore, he is within the provisions of the Fair Labor Standards Act, because "the Interstate Commerce Commission has not the power to establish for him, the plaintiff, qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935." See *Rozmus v. Jesse T. Davis & Sons Co.*, 23 N. Y. S. (2d) 821 (truck driver and delivery

man, who also performed services about the yard where employer's business was conducted); *Gavril v. Kraft Cheese Co.*, 42 F. (2d) 702 (driver-salesman of cheese and food products). The case of *State of Maryland v. Depew*, 175 Md. 274, has a setting so different from the instant case that the decision there is not helpful to the plaintiff. And the fact that the contents of the truck or trucks driven by Richardson, were liquid asphalt products, which, counsel for Richardson admits in his brief, are "flammable and explosive," we think, brings his case even more clearly within the decision of the *American Trucking Association's* case, *supra*.

But a more serious question arises in this case. The District Judge, though he may have done so inferentially, did not, in granting the motion to dismiss, pass expressly upon the question. At that time the case of *Bayley, et al., v. Southland Gasoline Co.*, (C. C. A. 8, November 2, 1942) had not been decided.

The period of Richardson's employment by Gibbons extended from October 24, 1938, until September 4, 1940. The defendant, Gibbons, qualified and has operated under the rules and regulations of the Interstate Commerce Commission since August 31, 1941. The Interstate Commerce Commission did not actually undertake the regulation of private motor carriers until May 1, 1940, when it made its finding that the regulation of private motor carriers was needed.

In the *Bayley* case, *supra*, the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Riddick, after setting out the relevant provisions of the Motor Carrier Act (given above) said:

"It is apparent from a reading of the Motor Carrier Act that while the Congress determined for itself the necessity for the regulation of common and contract carriers by motor vehicle in the respects stated in the Act, it did not determine the necessity of regulating private carriers by motor vehicle, such as the appellee

here, but left the determination of that question to the Interstate Commerce Commission, if, in the words of the Act, 'need therefor is found.' Obviously the three subsections of the Act, read together, clearly imply the intention of Congress that the power of the Commission with respect to private carriers should depend upon a finding by the Commission that the regulation was needed; that is to say, needed in the public interest in order to make effective regulation of common and contract carriers which Congress commanded, and to protect the public and the common and contract carriers from the consequences of unregulated competition by private carriers."

Then, after discussing the intent and purpose of the Fair Labor Standards Act, Judge Riddick continued:

"We hold that until the Interstate Commerce Commission made the finding of the necessity of the regulation of private carriers with respect to the matters specified in the Motor Carrier Act of 1935, it was without power to prescribe either qualifications or maximum hours for the employees of such carriers."

With all due deference, and all proper respect, for the learning and authority of that court, we, regretfully, cannot concur in the correctness of its decision or in the validity of the reasons advanced for that decision. We think the interpretation given in the *Bayley* case to the Fair Labor Standards Act and the Motor Carrier Act overlooks the keen interrelation of these two statutes and defeats the intents and purposes which Congress had in mind.

We are fully aware that the Motor Carrier Act, Sec. 204(a), gives absolute power to the Interstate Commerce Commission in paragraph (1) over common carriers by motor vehicle and in paragraph (2) over contract carriers by motor vehicle, while, as to private carriers of property by motor vehicle, there is in paragraph (3) the qualifying words "if need therefor is found." And such a finding is

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necessary before any affirmative and binding action can be taken by the Commission. Nor do we lightly brush aside the interpretation placed on the Fair Labor Standards Act by the Administrator in his Interpretative Bulletin No. 9. Yet we still think these considerations afford no valid basis for the *Bayley* decision.

The real question here is the meaning of the word "power" in Section 13(b) of the Fair Labor Standards Act. Congress, we think, meant the *existence* of the power *not its actual exercise*. The Fair Labor Standards Act was enacted after the Motor Carrier Act, and the later statute, we believe, intended to draw a line of cleavage between those cases on which the Interstate Commerce Commission could take action and those cases on which it could not. The restricted definition of the word "employee" in *United States v. American Trucking Association*, 310 U. S. 534, would seem to lend color to this view, and, we think we find in that opinion a reflection of the philosophy of the Fair Labor Standards Act and the Motor Carrier Act to which we adhere.

We cordially agree with the opinion in the *Bayley* case that the Fair Labor Standards Act, as a remedial statute, must be liberally construed. This we developed at some length in *Missel v. Overnight Transportation Co.*, 126 F. (2d) 98. But *salus populi suprema lex esto* and we should be equally careful not to restrict unduly any federal statute which, in the interest of public safety, undertakes to clothe the Interstate Commerce Commission with power to encompass so worthy an end. The vast importance of the private carrier of goods by motor vehicle is too well known to require comment. Congress must have appreciated this. We think, accordingly, that Congress was pretty well convinced that the Interstate Commerce Commission would (as it did) make a finding of the necessity of regulating these carriers. Any other finding would have been little less than shocking to the American public.

The *Bayley* decision gives to coverage under the Fair

Labor Standards Act a gap or hiatus in time, a kind of period of suspended animation to this same status of coverage. It makes certain employees subject to this Act and then, a moment later when the Interstate Commerce Commission has made the finding of necessity, the coverage of the Act suddenly ceases. We hesitate to think that Congress deliberately undertook to bring about such a situation, with all the pains, penalties and uncertainties thereunto appertaining. Again the Fair Labor Standards Act was never drawn with the idea of making a complete coverage of all employees engaged in interstate transportation. By its terms a number of exceptions are made, such as fishermen and farmers.

Our own researches, and those of counsel, have failed to turn up any decision of a Circuit Court of Appeals, with the exception of the *Bayley* case, passing directly on the instant question. Under the circumstances, we advert briefly to opinions in the federal District Courts, all of which buttress the stand we take in the instant case.

The District Judge in the *Bayley* case (overruled by the Circuit Court of Appeals) held expressly that the power of the Interstate Commerce Commission to regulate private carriers was not dependent upon a prior finding by the Commission that such regulation was necessary. In *Faulkner v. Little Rock Manufacturing Co.*, 32 F. Supp. 590, 591, District Judge TRIMBLE (E. D. Arkansas) said:

... It appearing that under the provisions of Section 304 (a) (3), Congress has delegated to the Interstate Commerce Commission the power to make regulations for qualifications and the maximum hours of service for such employees, the whole field is occupied and it further appearing that under the provisions of the Fair Labor Standards Act of 1938 as amended the regulation of qualifications and maximum hours of service of employees 'with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service' have been

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exempted from the provisions of the Fair Labor Standards Act of 1939, there is and could be no reservation of power to the administrator of the Fair Labor Standards Act of 1938 to act until such time as the Interstate Commerce Commission shall see fit to act."

The first two headnotes to *Bechtel v. Stillwater Mining Co.*, 33 F. Supp. 1010, (District Judge VAUGHT, E. D. Oklahoma) read:

"Under Motor Carrier Act authorizing Interstate Commerce Commission to prescribe maximum hours of service of employees if need therefor is found, failure of commission to prescribe maximum hours of service of employees does not divest the commission of power granted to it by Congress.

"Under Motor Carrier Act authorizing Interstate Commerce Commission to prescribe maximum hours of service of employees of private motor carriers, 'if need therefor is found,' the quoted expression is a limitation on the commission in prescribing maximum hours of service but is not a limitation on the power granted by Congress to the commission."

In *West v. Smoky Mountain Stages*, 40 F. Supp. 296, 298-299, District Judge UNDERWOOD (N. D. Georgia), stated:

"... The fact that the Interstate Commerce Commission may not have assumed jurisdiction over mechanics prior to this suit is immaterial. The exemption of employees from application of the Fair Labor Standards Act is not made, by Section 13 (b) of the Act, to depend upon the exercise of power over them by the Interstate Commerce Commission but merely upon the existence of 'power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 (304 of Title 49) of the Motor Carriers Act.' The evidence in this case establishes the fact that the Interstate Commerce Commission had this power and that fact excludes jurisdiction of the administrator over the plaintiff's activities and the Fair Labor

Standards Act was, therefore, not applicable in the plaintiff's situation and no cause of action is set forth in his petition."

Said District Judge CAMPBELL (N. D. Illinois) in *Gavril v. Kraft Cheese Co.*, 42 F. Supp. 702, 705:

"Accordingly the exemption contained in Section 13 (b) (1) of the Fair Labor Standards Act applies to the plaintiffs in this case and they are excluded from the provisions of Section 7 of the same Act. The fact that the order of the Interstate Commerce Commission establishing such qualifications and maximum hours of service did not become effective until October 15, 1940, is immaterial. The determining factor in applying the exemption is whether or not the Interstate Commerce Commission 'has power' to establish such qualifications and maximum hours of service. There is no question that since the plaintiffs in this case are engaged in interstate commerce that the Interstate Commerce Commission does not have that power and, therefore, the exemption applies regardless of the time at which the Commission exercises such power."

And District Judge FORD, (D. Massachusetts) in *Robbins v. Zabarsky*, 44 F. Supp. 867, 870, crisply held:

"If the Interstate Commerce Commission has the power to fix maximum hours for a given employee, the Fair Labor Standards Act is not applicable to him, regardless of whether or not the Commission has exercised the power. That is the plain language of Section 13(b) (1) and the construction by the courts has followed it."

Also, compare the language of District Judge BARNSDALE (W. D. Virginia) in *Magann v. Long's Baggage Transfer Co.*, 39 F. Supp. 742, 749, 750, citing the *Bechtel* and *Faulkner* cases, *supra*.

The judgment of the District Court is affirmed.

Affirmed.

MAR 3 1943

CHARLES F. BAYLEY

No. 581

In the Supreme Court of the United States

October Term, 1942.

SOUTHLAND GASOLINE COMPANY, *Petitioner,*

vs.

J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL,
OWEN REDING AND W. J. BAYLEY, *Respondents.*

BRIEF OF PETITIONER.

CLAUDE H. ROSENSTEIN,

Attorney for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.
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SOUTHLAND GASOLINE COMPANY, *Petitioner,*

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BRIEF of PETITIONER.

(Emphases herein are ours.)

The Memorandum Opinion of the District Court (not reported) appears at pages 18 to 21 of the record; the Opinion of the Circuit Court of Appeals is reported as *Bayley, et al., v. Southland Gasoline Co.*, 131 F. (2d) 412.

Grounds on Which Jurisdiction of This Court Is Invoked.

The jurisdiction of this Court is invoked by petition for writ of *certiorari* pursuant to Tit. 28, Sec. 347(a), U. S. C. A. (26 Stat. 828, as amended by 36 Stat. 1157 and 43 Stat. 938). The petition for writ of *certiorari* including memorandum, supplementing petition for writ of *certiorari*, set forth the following grounds on which the jurisdiction of this Court is invoked to review the judgment and decision

of the Circuit Court of Appeals for the Eighth Circuit, to-wit:

(a) The decision of the Circuit Court of Appeals involves an important question of Federal law which has not been but should be settled by this Court.

(b) The decision of the Circuit Court of Appeals is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court.

(c) The decision of the Circuit Court of Appeals is in conflict with the weight of authority and is contrary to uniform decisions of the District Courts in many of the circuits.

(d) The decision appealed from, by the Circuit Court of Appeals for the Eighth Circuit, is in conflict with a decision of the Circuit Court of Appeals for the Fourth Circuit on the same matter.

Statement of the Case.

This suit is a civil action filed January 2, 1942 (Rec. p. 1), by respondents, as plaintiffs, against petitioner, as defendant, in the District Court of the United States for the Western District of Arkansas.

The complaint filed in the District Court (Rec., pp. 1-16) alleged that the respondents were employees of the petitioner; that petitioner during the period of time between October 24, 1938, and October 15, 1940, was engaged in the gasoline business and in pursuance of that business purchased gasoline, automobile tires, batteries and automobile accessories in the State of Oklahoma and caused these articles to be loaded upon petitioner's trucks and transported to the State of Arkansas where petitioner sold them, at

wholesale, to retail establishments in the State of Arkansas, for resale to the general public; that petitioner each week loaded trucks in the State of Arkansas with automobile tires, accessories and automotive equipment and transported such articles to the State of Oklahoma where they were sold at wholesale to retail establishments in that state for resale to the general public; that petitioner in the conduct of its business operated and maintained trucks and engaged in trucking operations as "a private carrier"; that during all such time each of respondents was employed by petitioner as a truck driver and each respondent, in this capacity, drove petitioner's trucks each week from Arkansas to Oklahoma and from Oklahoma to Arkansas, which trucks were used by petitioner in carrying on its gasoline business. Respondents further alleged failure, on the part of the petitioner, to pay each of the respondents time and one-half for services performed by them, as such truck drivers, in excess of the maximum hours provided by the Fair Labor Standards Act.

Certain of the respondents (Henry V. Bloom, G. C. Kendall, and Owen Reding) also alleged a failure to pay the minimum wage provided by Section 6(a) of the Fair Labor Standards Act (Tit. 29, Sec. 206(a), U. S. C. A., 52 Stat. 1062). The claim of these respondents to recover minimum wages pursuant to Section 6(a) of the Fair Labor Standards Act, however, was not in controversy on the appeal to the Circuit Court of Appeals. The order of the District Court (Rec., pp. 21-23) from which the appeal was prosecuted to the Circuit Court of Appeals for the Eighth Circuit, sustained petitioner's motion to dismiss the complaint of respondents only as to their claim for overtime compensation under Section 7 of the Fair Labor Standards Act.

The District Court held (Rec., pp. 18-21) that respondents were not entitled to the benefits of Section 7(a) of the Fair Labor Standards Act (Tit. 29, Sec. 207(a), U. S. C. A., 52 Stat. 1063) because they were included within the exemption granted by Section 13(b)(1) of the Fair Labor Standards Act (Tit. 29, Sec. 213(b)(1), U. S. C. A., 52 Stat. 1067) exempting any employee "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions" of Section 204 of the Motor Carrier Act of 1935.

The pertinent portion of the Motor Carrier Act of 1935 (being a part of Section 204(a) thereof) provides, in substance, that it shall be the duty of the Interstate Commerce Commission:

(1) To regulate common carriers by motor vehicle and to that end to establish qualifications and maximum hours of service of employees;

(2) To regulate contract carriers by motor vehicle and to that end to establish qualifications and maximum hours of service of employees; and

(3) To establish for private carriers of property by motor vehicle "if need therefor is found" reasonable requirements to promote safety of operation and to that end prescribe qualifications and maximum hours of service of employees.

It is the contention of respondents that the exemption prescribed by Section 13(b)(1) of the Fair Labor Standards Act is not applicable to employees of *private carriers* of property by motor vehicle until the Interstate Commerce Commission found that a need existed which authorized the Commission to *exercise* the authority granted it to prescribe qualifications and maximum hours of service of employees of private carriers of property by motor vehicle. On the

other hand, it is the contention of petitioner that the Commission at all times from and since the passage of the Fair Labor Standards Act had the "power" to establish qualifications and maximum hours of service of employees of private carriers of property by motor vehicle and that consequently such employees (to which class the respondents belong) were never subject to the overtime wage provision contained in Section 7(a) of the Fair Labor Standards Act. The District Court sustained petitioner's contention in this respect.

The respondents, as appellants, prosecuted an appeal from the decision and judgment of the District Court to the Circuit Court of Appeals for the Eighth Circuit, which court reversed the judgment and decision of the District Court. The appeal involved a construction of Sections 7(a) and 13(b) of the Fair Labor Standards Act and Section 304 of the Motor Carrier Act (Tit. 49, Sec. 304, U. S. C. A., 49 Stat. 546). The Circuit Court of Appeals held and decided (Rec., pp. 23-27) that the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act 1938, did not apply to employees of private carriers until the Interstate Commerce Commission made a finding (on May 1, 1940) of the necessity for regulation of private carriers with respect to the matters specified in the Motor Carrier Act 1935.

Specification of Assigned Errors Intended to Be Urged.

1. The Circuit Court of Appeals erred in holding and deciding that the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act (Tit. 29, Sec. 213(b)(1), U. S. C. A., 52 Stat. 1067), providing that Section 7 of the Fair Labor Standards Act (29 U. S. C. A., Sec. 207, 52 Stat. 1063) is not applicable to any employee "with respect to

whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service" pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935 (Tit. 49, Sec. 304(a)(3), U. S. C. A.) did not apply to respondents until May 1st, 1940, on which date the Interstate Commerce Commission found that a need existed for the regulation of private carriers of property by motor vehicle.

2. The Circuit Court of Appeals erred in holding and concluding that respondents by their complaint, stated a claim for the recovery of overtime compensation pursuant to the provisions of the Fair Labor Standards Act of 1938.

ARGUMENT.

The complaint filed in this cause by respondents (Rec. pp. 1-16) sought recovery on behalf of respondents from petitioner of compensation, liquidated damages and attorneys' fees for failure to pay the statutory minimum wages and for failure to pay the statutory compensation for overtime as required by Sections 6 and 7 of the Fair Labor Standards Act of 1938.

The District Court sustained petitioner's motion to dismiss the complaint of respondents *as to the claims set forth therein for recovery on account of overtime. The question of recovery because of failure to pay minimum compensation (Section 6 of the Fair Labor Standards Act of 1938) was not involved in the decision of the District Court nor in the opinion and judgment of the Circuit Court of Appeals.*

The order of the District Court (Rec., pp. 21-23) from which the appeal was prosecuted to the Circuit Court of Appeals sustained petitioner's motion to dismiss the complaint of respondents as to the claims for overtime compensation under Section 7(a) of the Fair Labor Standards Act.

PROPOSITION I.

(Specifications of Error 1 and 2.)

The Act is not applicable to respondents' claim for overtime compensation because of the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act of 1938.

The District Court held that the exemption contained in Section 13(b)(1) of the Fair Labor Standards Act of 1938 applied to respondents. The Circuit Court of Appeals in its opinion concluded that the exemption contained in Section 13(b)(1) was not applicable to respondents during the period of time in controversy in this action.

Section 13(b)(1) of the Fair Labor Standards Act provides that the provisions of Section 7 of the Act shall not apply with respect to any employee "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions" of Section 204 of the Motor Carrier Act of 1935.

The respondents, according to the allegations of their complaint, were employees of a private carrier of property by motor vehicle, whose employment affected safety of operation.

The substantive issue presented to the Circuit Court of Appeals was:

Did the Interstate Commerce Commission have power

to prescribe qualifications and maximum hours of service for employees of private carriers of property by motor vehicle from the effective date of the Motor Carrier Act of 1935, or did that power not come into existence until May 1, 1940, on which date the Interstate Commerce Commission (*Ex parte* No. MC-3, Div. No. 5, Interstate Commerce Commission) determined that a need existed for regulation by the Commission, of private motor carriers engaged in interstate or foreign commerce?

The decision of the Circuit Court of Appeals, in our judgment, is bottomed on an erroneous conclusion concerning this question. Its correct solution determines whether the Circuit Court of Appeals rightly or wrongly decided.

It is the contention of petitioner, which contention, we believe, is supported by the great weight of authority, that the Interstate Commerce Commission *had power*, at all times subsequent to the approval of the Motor Carrier Act of 1935, to prescribe maximum hours of service and qualifications for the employees of private carriers of property by motor vehicle; that the Commission's right to *exercise* this power was based upon its finding of a need therefor, but that the *power* at all times existed. It is the further contention of petitioner that the exemption granted by Section 13(b)(1) of the Fair Labor Standards Act of all employees with respect to whom the Interstate Commerce Commission *had power* under the Motor Carrier Act to establish qualifications and maximum hours of service included at all times, such employees of private carriers of property by motor vehicle despite the fact that the Commission had not found the need for the *exercise* of this power and had not actually exercised the power so conferred upon it by the Motor Carrier Act, as to private carriers.

The Circuit Court of Appeals held the exemption of Section 13(b)(1) was not applicable to respondents solely and only because the Commission, at the time the Fair Labor Standards Act became effective, had not found and did not, until May 1, 1940, find that a need existed for the regulation of private carriers of property by motor vehicle. The question determined by the Circuit Court of Appeals for the Eighth Circuit has been decided, so far as we have been able to ascertain, by only one other Circuit Court of Appeals. The question, however, has been determined by a substantial number of United States District Courts. Except for the decision of the Circuit Court of Appeals for the Eighth Circuit, in this case, the decisions (including the decision of the Circuit Court of Appeals for the Fourth Circuit) are unanimous in holding that the exemption provided by Section 13(b)(1) applied at all times since the adoption of the Fair Labor Standards Act, despite the fact that it was not until May 1, 1940, that the Interstate Commerce Commission found that a need existed for the exercise of the power granted by Congress to regulate private carriers of property by motor vehicle.

The following decisions sustain the contention of petitioner:

Richardson v. The James Gibbons Company, No. 4964, United States Circuit Court of Appeals for the Fourth Circuit, decided December 26, 1942—not yet reported;

Faulkner v. Little Rock Furniture Mfg. Co., 32 F. Supp. 590 (D. C. E. D. Ark., April 9, 1940);

Bechtel v. Stillwater Milling Co., 33 F. Supp. 1010 (D. C. West. Dist. Okla., June 25, 1940);

Gerdert v. Certified Poultry & Egg Co., Inc., 38 F. Supp. 964 (D. C. So. Dist. Fla., Apr. 29, 1941);

West v. Smoky Mountains Stages, Inc., 40 F. Supp. 296 (D. C. N. D. Ga., August 5, 1941);

Gavril v. Kraft Cheese Co., (Fleming, Administrator of Wage and Hour Division, United States Department of Labor, Intervener) 42 F. Supp. 702 (D. C. N. D. Ill., November 27, 1941);

Robbins v. Zabarsky, 44 F. Supp. 867 (D. C. Mass., May 7, 1942);

Fitzgerald v. Kroger Grocery & Baking Co., 45 F. Supp. 812 (D. C. Kan., June 22, 1942);

Clarence Gibson v. Wilson & Company, 4 Labor Cases, No. 60466 (D. C. W. D. Tenn., March 20, 1941).

The Circuit Court of Appeals for the Fourth Circuit in *Richardson v. The James Gibbons Company*, No. 4964, not yet reported, gave consideration to the decision of the Circuit Court of Appeals for the Eighth Circuit in this case and concluded that it could not concur in the correctness of the decision of the Circuit Court of Appeals for the Eighth Circuit or in the validity of the reasons advanced therefor. The pertinent portion of the opinion (by Circuit Judge Dowie) of the Fourth Circuit Court of Appeals in *Richardson v. The James Gibbons Company*, *supra*, reads as follows:

But a more serious question arises in this case. The District Judge, though he may have done so inferentially, did not, in granting the motion to dismiss, pass expressly upon the question. At that time the case of *Bayley, et al., v. Southland Gasoline Co.*, (C. C. A. 8, Nov. 2, 1942) had not been decided.

The period of Richardson's employment by Gibbons extended from October 24, 1938, until September 4, 1940; the defendant, Gibbons, qualified and has operated under the rules and regulations of the Interstate

Commerce Commission since August 31, 1941. The Interstate Commerce Commission did not actually undertake the regulation of private motor carriers until May 1, 1940, when it made its finding that the regulation of private motor carriers was needed."

"In the *Bayley* case, *supra*, the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Riddick, after setting out the relevant provisions of the Motor Carrier Act (given above) said:

"It is apparent from a reading of the Motor Carrier Act that while the Congress determined for itself the necessity for the regulation of common and contract carriers by motor vehicle in the respects stated in the act, it did not determine the necessity of regulating private carriers by motor vehicle, such as the appellee here, but left the determination of that question to the Interstate Commerce Commission, if, in the words of the act, "need therefor is found." Obviously the three subsections of the act, read together, clearly imply the intention of Congress that the power of the Commission with respect to private carriers should depend upon a finding by the Commission that the regulation was needed; that is to say, needed in the public interest in order to make effective regulation of common and contract carriers which Congress commanded, and to protect the public and the common and contract carriers from the consequences of unregulated competition by private carriers."

"Then, after discussing the intent and purpose of the Fair Labor Standards Act, Judge Riddick continued:

"We hold that until the Interstate Commerce Commission made the finding of the necessity of the regulation of private carriers with respect to the matters specified in the Motor Carrier Act of 1935,

it was without power to prescribe either qualifications or maximum hours for the employees of such carriers.'

"With all due deference, and all proper respect, for the learning and authority of that court, we, regretfully, cannot concur in the correctness of its decision or in the validity of the reasons advanced for that decision. We think the interpretation given in the *Bayley* case to the Fair Labor Standards Act and the Motor Carrier Act overlooks the keen interrelation of these two statutes and defeats the intents and purposes which Congress had in mind.

"We are fully aware that the Motor Carrier Act, Sec. 204(a), gives absolute power to the Interstate Commerce Commission in paragraph (1) over common carriers by motor vehicle and in paragraph (2) over contract carriers by motor vehicle, while, as to private carriers of property by motor vehicle, there is in paragraph (3) the qualifying words 'if need therefor is found.' And such a finding is necessary before any affirmative and binding action can be taken by the Commission. Nor do we lightly brush aside the interpretation placed on the Fair Labor Standards Act by the Administrator in his Interpretative Bulletin No. 9. Yet we still think these considerations afford no valid basis for the *Bayley* decision.

"The real question here is the meaning of the word 'power' in Section 13(b) of the Fair Labor Standards Act. Congress, we think, meant the *existence* of the power *not its actual exercise*. The Fair Labor Standards Act was enacted after the Motor Carrier Act, and *the later statute, we believe, intended to draw a line of cleavage between those cases on which the Interstate Commerce Commission could take action and those cases on which it could not*. The restricted definition of the word 'employee' in *United States v. American Trucking Association*, 310 U. S. 534, would seem to lend

color to this view, and, we think we find in that opinion a reflection of the philosophy of the Fair Labor Standards Act and the Motor Carrier Act to which we adhere.

"We cordially agree with the opinion in the *Bayley* case that the Fair Labor Standards Act, as a remedial statute, must be liberally construed. This we developed at some length in *Missel v. Overnight Transportation Co.*, 126 F. (2d) 98. But *salus populi suprema lex esto* and we should be equally careful not to restrict unduly any federal statute which, in the interest of public safety, undertakes to clothe the Interstate Commerce Commission with power to encompass so worthy an end. The vast importance of the private carrier of goods by motor vehicle is too well known to require comment. Congress must have appreciated this. We think, accordingly, that Congress was pretty well convinced that the Interstate Commerce Commission would (as it did) make a finding of the necessity of regulating these carriers. Any other finding would have been little less than shocking to the American public.

"The *Bayley* decision gives to coverage under the Fair Labor Standards Act a gap or hiatus in time, a kind of period of suspended animation to this same status of coverage. It makes certain employees subject to this act and then, a moment later when the Interstate Commerce Commission has made the finding of necessity, the coverage of the act suddenly ceases. We hesitate to think that Congress deliberately undertook to bring about such a situation, with all the pains, penalties and uncertainties thereunto appertaining. Again the Fair Labor Standards Act was never drawn with the idea of making a complete coverage of all employees engaged in interstate transportation. By its terms a number of exceptions are made, such as fishermen and farmers.

"Our own researches, and those of counsel, have failed to turn up any decision of a Circuit Court of Appeals with the exception of the *Bayley* case, passing directly on the instant question. Under the circumstances, we advert briefly to opinions in the Federal District Courts, *all of which buttress the stand we take in the instant case.*"

The gist of the decisions of the eight United States District Courts, hereinbefore cited, is concisely stated in the fifth paragraph of the syllabus of *Gavril v. Kraft Cheese Co.*, (Fleming, Administrator of Wage and Hour Division, United States Department of Labor, Intervener) 42 Fed. Supp. 702, (D. C., N. D., Ill.) which reads:

"Under Fair Labor Standards Act providing that section limiting hours of work and defining rate of overtime compensation shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service under the Motor Carrier Act, driver-salesmen of employer engaged on a national scale in the manufacture and distribution at wholesale of cheese and other food products were excluded from the wage and hour provision of the Fair Labor Standards Act *regardless of the time at which the Interstate Commerce Commission exercised its power to establish qualifications and maximum hours of service for such employees.*"

The decision of the Circuit Court of Appeals, is based in part on the authority of Interpretative Bulletin No. 9, (United States Department of Labor, Wage and Hour Division—originally issued March, 1939). This bulletin states that it is the administrator's opinion that until an order is issued by the Interstate Commerce Commission, finding the need for regulation, "employees of private carriers should

be considered as not within the exemption provided by Section 13(b)(1).” The following important preface to Interpretative Bulletin No. 9, however, should be considered. It reads:

“The scope of the exemption provided in Section 13(b)(1) involves the interpretation not only of the Fair Labor Standards Act but also of Section 204 of the Motor Carrier Act, 1935. *The act confers no authority upon the Administrator to extend or restrict the scope of the exemption provided in Section 13(b)(1) or even to impose legally binding interpretations as to its meaning. This bulletin is merely intended to indicate the course which the Administrator will follow in the performance of his administrative duties until otherwise required by authoritative ruling of the courts.*” (Par. 2, Int. Bull. No. 9)

The above statement is particularly enlightening when it is remembered that the Administrator intervened in the case of *Gavril v. Kraft Cheese Co., supra*; that the court “otherwise” determined the interpretation of the exemption granted by Section 13(b)(1) in that case, and that *no appeal was taken from that decision, but it was allowed to and has become final.*

The Circuit Court of Appeals bases its opinion, in part, also on certain decisions of this court. The pertinent portion of the opinion of the Circuit Court of Appeals, including the citation of the cases relied upon, reads:

“The rule is that where the legislature invests an administrative body or other agency of the government with power to act on or in accordance with a hearing or a finding, the delegated power does not come into existence until the hearing is had or the determination is made. In such circumstances a finding is jurisdictional and action without the finding is void. *Panama*

Refining Co. v. Ryan, 293 U. S. 388, 431, 55 Sup. Ct. 241, 79 L. ed. 446; *United States v. B. & O. Ry. Co.*, 293 U. S. 454, 462, 55 Sup. Ct. 268, 79 L. ed. 587; *Mahler v. Eby*, 264 U. S. 32, 44 Sup. Ct. 283, 68 L. ed. 549; *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 43 Sup. Ct. 55, 67 L. ed. 124."

The interpretation of the above cited decisions of this Honorable Court by the Circuit Court of Appeals is, in our humble judgment, in conflict with the decisions actually rendered by this Honorable Court in these cases and constitutes the decision of a Federal question in a way probably in conflict with applicable decisions of this court. The decisions of this court above referred to, instead of holding that where the Legislature invests an administrative body or other agency of the Government with *power* to act on or in accordance with a hearing or a finding, the delegated *power* does not come into existence until the hearing is had or the determination is made, on the contrary hold that the *power* at all times exists in the administrative body or other agency of the Government, but that it is a condition to the exercise of this power that such finding or determination be made.

For instance, in *Mahler v. Eby*, *supra*, Mr. Justice TAFT in the court's opinion in that case said:

"It is essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise, and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act."

None of the above cases holds that *power* delegated by the Legislative Department, to be exercised on the finding of the existence of certain facts, is not at all times from and after the passage of the act vested in the Administrative

body or other governmental agency, but they do hold that the power can only *be exercised* upon a proper finding of the conditions under which the legislative branch of the Government has authorized the *power* to be exercised.

The fundamental fallacy of the decision of the Circuit Court of Appeals lies in the fact that the court confuses "power" with *the conditions under which that power may be exercised*. If the Fair Labor Standards Act of 1938 by the provisions of Section 13(b)(1) had exempted employees as to whom the Interstate Commerce Commission *had prescribed* qualifications and maximum hours of service, then the decision of the Circuit Court of Appeals would be well founded, *but the act does not so define the exemption*.

The fact that by the terms of the Motor Carrier Act the Interstate Commerce Commission is not to *exercise its power* to prescribe qualifications and maximum hours of service for employees of private carriers of property by motor vehicle, until need therefor is found, *does not mean that the Interstate Commerce Commission was not at all times vested with such power*, any more than it can be properly said that a court of general equity jurisdiction does not at all times have *power* to appoint receivers because of the fact that the power to make such appointments will be exercised only when the court determines the existence of conditions or circumstances under which a need therefor exists.

The proper interpretation of the clause "if need therefor is found" is well expressed by District Judge Boyd in his findings of fact and conclusions of law, filed in the case of *Clarence Gibson v. Wilson & Company*, decided by him as Judge of the District Court for the Western Division of the the Western District of Tennessee on March 20, 1941, 4

Labor Cases (Commerce Clearing House) No. 60,466. Conclusion of Law No. VII reads:

"The words 'if need therefor is found,' in Section 204(a) (3) of the Motor Carrier Act, 1935, constitute a restriction and limitation upon the exercise by the Commission of the power granted to it to regulate maximum hours and qualifications of service of truck drivers of private carriers, but do not restrict or limit the power granted to the commission so to regulate the maximum hours and qualifications of service of such employees."

This court had occasion to consider the power of the Interstate Commerce Commission, under the Motor Carrier Act of 1935, to establish qualifications and maximum hours of service of employees of motor carriers, in the case of *United States v. American Trucking Associations*, 310 U. S. 534-553, 60 Sup. Ct. 1059, 84 L. ed. 1345. In that case it was held that the employees with respect to whom the Interstate Commerce Commission had power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935 were those employees whose duties affect safety of operation. (Respondents are all truck drivers and they are concededly employees whose duties affect safety of operation). It is true that the decision of this court in *United States v. American Trucking Associations*, *supra*, was concerned only with employees of common and contract carriers by motor vehicle, but it also seems evident, from the opinion in that case, that the court concluded that the power of the Commission extended equally to employees of common, contract and private carriers. It was the contention of appellees in the *American Trucking Associations* case that the difference in language between Sub-sections (1) and (2) and Sub-section (3) of Section 204 of the Motor Carrier Act was indicative

of a Congressional purpose to restrict the regulation of employees of private carriers to "safety of operation" while giving broader authority as to employees of common and contract carriers. This court rejected that contention and in the course of its opinion, delivered by Mr. Justice REED, among other things, said:

"The Senate Committee's report explained the provisions of Sec. 204(a) (1), (2), 49 U. S. C. A., Sec. 304(a) (1), (2) as giving the Commission authority over common and contract carriers *similar to that given over private carriers* by Sec. 204(a) (3), 49 U. S. C. A., Sec. 304(a) (3)."

Again, in the opinion, in discussing an amendment to Section 203 of the Motor Carrier Act, providing an exemption of certain motor vehicles from the provisions of the act, except the provisions of Section 204 thereof, this court said:

"It is evident that the exempted vehicles and operators include common, contract and private carriers."

We, therefore, believe the proper interpretation of this court's decision in *United States v. American Trucking Associations, supra*, leads to the conclusion that the power of the Interstate Commerce Commission to prescribe qualifications and maximum hours of service of "employees" extends alike to employees of common, contract and private carriers and that the only limitation upon the power of the Commission is that delineated by this court in the above mentioned decision, to-wit, that the power of the Commission is limited to employees whose duties affect safety of operation.

It is true that the conditions under which the Commission may exercise its power as to employees of private car-

riers are restricted further by the fact that the Commission must find a necessity for such regulation, but this is not a limitation upon the Commission's *power*, but a condition upon which the power *may be exercised*.

We, therefore, conclude that the Circuit Court of Appeals for the Eighth Circuit, by its decision in this case, erroneously decided that respondents were not exempt from the overtime provisions of the Fair Labor Standards Act and that such judgment and decision should be reversed.

Respectfully submitted,

CLAUDE H. ROSENSTEIN,
Attorney for Petitioner.

No. 581

In the Supreme Court of the United States

October Term, 1942.

SOUTHLAND GASOLINE COMPANY, *Petitioner,*

vs.

**J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL,
OWEN REDING AND W. J. BAYLEY, *Respondents.***

REPLY BRIEF OF PETITIONER.

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Attorney for Petitioner.

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REPLY BRIEF *of* PETITIONER.

Argument.

(Emphases herein are ours.)

Respondents correctly state that:

"The determination of the question involved in the case at bar rests upon the correct construction and interpretation of Section 13 (b) (1) of the Fair Labor Standards Act of 1938 and Section 204 of the Motor Carrier Act of 1935." (Brief of respondents, p. 4)

The language of Section 13 (b) (1) of the Fair Labor Standards Act, clearly discloses it was the intention of Congress, in setting up the exemption thereby provided, that the provisions of Section 7 of the Fair Labor Standards Act (the overtime wage provisions) should not apply to "*any employee*" concerning whom the Interstate Commerce Commission has "*power*" to establish qualifications and maxi-

imum hours of service pursuant to Section 204 of the Motor Carrier Act, 1935.

It is also conceded by all parties hereto that respondents were employees of a private carrier of property by motor vehicle whose activities affected safety of operation (truck drivers); and that consequently Section 204 of the Motor Carrier Act gave the Interstate Commerce Commission authority to prescribe for them "maximum hours of service." The entire controversy herein, therefore, in its final analysis, turns on the determination of whether the word "power" in Section 13 (b) (1) of the Fair Labor Standards Act means what it says or whether it shall be restricted and interpreted to mean that such power did not exist in the Interstate Commerce Commission until it had, *pursuant to the power thus given it*, conducted a hearing and found a need for the Commission to *exercise* its power to prescribe maximum hours for employees of private carriers.

At the time the Fair Labor Standards Act was adopted the Interstate Commerce Commission had not put into effect regulations governing the maximum hours of service of employees of common and contract carriers of property, (11 M. C. C. 203) although it is conceded by respondents and by the Administrator of the Wage and Hour Division, who has filed a brief herein *amicus curiae*, that the exemption provided by Section 13 (b) (1) of the Fair Labor Standards Act *was applicable at all times to employees of common and contract carriers*. The sole basis for the contention that the application of the exemption should be postponed as to employees of private carriers lies in the fact that subparagraph (3) of Section 204 (a) of the Motor Carrier Act, contains the words "if need therefor is found," which words do not appear in subparagraphs (1) and (2) of said Section 204 (a) of the Motor Carrier Act. It is, therefore, contended by

counsel for respondents and by the Solicitor General, on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, that employees of private carriers of property by motor vehicle should be subject to the provisions of the Fair Labor Standards Act *until* the Interstate Commerce Commission found that a need existed for it to prescribe qualifications and maximum hours of service for such employees of private carriers.

It is first contended that the Motor Carrier Act, 1935, should be construed as not vesting in the Interstate Commerce Commission any authority to regulate employees of private carriers of property by motor vehicle until the Commission has made its finding of necessity. Certain decisions of this court are cited in support of this contention, namely:

United States v. Baltimore & O. R. Co., 293 U. S. 454, 463;

Mahler v. Eby, 264 U. S. 32, 45; and

Atchison, Topeka and Santa Fe Ry. Co. v. United States, 295 U. S. 193, 202.

These decisions when carefully analyzed we submit do not support this contention. On the contrary, they hold that when *the exercise* of delegated legislative authority is conditioned upon the existence of certain conditions the body to which the authority is delegated must, *as a condition precedent to the right to exercise its authority*, find the existence of the conditions upon which its "power" or authority is to be exercised.

—*Secondly*, it is contended that the exemption provided by Section 13 (b) (1) was adopted not for the purpose of freeing the hours of the employees therein referred to from regulation, but for the purpose of avoiding overlapping or conflicting regulation by different governmental agencies. Undoubtedly the purpose of Congress in placing in the Fair Labor Standards Act the exemption contained in Section 13

(b) (1) was to avoid conflicting authority. However, we think it evident, from the plain meaning of the language used in this exemption, that Congress intended to deny to the Administrator of The Fair Labor Standards Act *any authority over any employee* as to whom the Interstate Commerce Commission *has power* to establish maximum hours of service pursuant to the Motor Carrier Act. It seems to us that the language of the exemption could not have been more clear and specific. If Congress had intended to exempt only those employees for whom the Interstate Commerce Commission had actually prescribed regulations or might thereafter prescribe regulations it would have been most obvious and most simple for the Act to have said that those employees as to whom the Interstate Commerce Commission has prescribed regulations shall be exempt. It did not do that, however. It said that those employees with respect to whom the Interstate Commerce Commission has "*power to establish qualifications and maximum hours of service*" shall be exempt from the overtime wage provisions of the Fair Labor Standards Act. The language itself is so plain and so simple that it seems to us it needs no construction. The purpose of the exemption we submit is also perfectly apparent. It was not to prevent conflicting regulations but it was to prevent two agencies having the power or the right to regulate the hours of these particular employees; to avoid any possible *conflict of jurisdiction* between the two (2) agencies of government to-wit, the Interstate Commerce Commission and the Wage and Hour Division of the United States Department of Labor, concerning those employees over whom the Interstate Commerce Commission *might, at any time*, exercise its authority to establish maximum hours of service. This construction is in harmony with the statement of the Chairman of the Senate Committee quoted on page 10 of the administrator's brief, to-wit:

"It was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such way as not to conflict with such regulation.' 81 Cong. Rec. 7875 (1937)."

Section 204 (a) (3) of the Motor Carrier Act most certainly gave to another governmental agency the authority to regulate the maximum hours of service of employees of motor carriers. It is true these regulations as to employees of private carriers were to be prescribed by the Interstate Commerce Commission only "if need therefor is found." It is, however, to be presumed that the Interstate Commerce Commission would exercise its authority whenever such need was found to exist. In any event it cannot be properly said that the Interstate Commerce Commission had not been given the *power or right to regulate* the hours of service of employees of private carriers. It is, therefore, clear, it seems to us, both from the language of the act itself and from the congressional history thereof that it was intended to exempt all such employees from the provisions of Section 7 of the Fair Labor Standards Act.

The exemption was not based upon the question of whether the Interstate Commerce Commission had or had not exercised its jurisdiction or power but it was clearly and concisely stated so as to cover all employees whose hours the Interstate Commerce Commission *might*, under any conditions regulate by virtue of the powers and duties vested in the Interstate Commerce Commission pursuant to the Motor Carrier Act.

Thirdly, it is contended that it was the purpose of the Fair Labor Standards Act to include within its jurisdiction every employee engaged in interstate commerce or in the production of goods for interstate commerce except those specifically exempted and that the coverage of the Fair

Labor Standards Act must be liberally construed, because it is a remedial statute, and the exemptions thereof strictly construed. We have no quarrel with this principle of construction. It is supported by the decisions of this Court, including the decision of this court in the case of *McDonald v. Thompson*, 305 U. S. 263-266, which case holds *that the Motor Carrier Act of 1935 is a remedial statute and is, therefore, to be construed liberally.* This contention, however, does not answer the question. A strict construction of the exemption provided by Section 13 (b) (1) does not mean that the plain language of the exemption is to be disregarded. It must be given its proper effect and the exemption must be applied to those employees who come within its terms.

The applicable rule is concisely stated in *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8th Cir.) in the following language:

"The meaning of the statute must in the first instance at least be sought in its language, and *if that is plain and the act is constitutional, the sole function of the court is to enforce it.* *Caminetti v. United States*, 242 U. S. 470, 37 S. Ct. 192, 61 L. ed. 442, L. R. A. 1917F 502, Ann. Cas. 1917B, 1168. If the statutory meaning is clear, there is, of course no occasion to resort to rules of construction."

No reason or authority has been advanced or cited in the brief of respondents nor in the brief of the administrator, *amicus curiae*, for the proposition that the Interstate Commerce Commission *had no power* to regulate the hours of employees of private carriers of property by motor vehicle at the time of the passage and approval of the Fair Labor Standards Act of 1938. True, it is suggested that this power should be held not to come into being until the Commission found the existence of the conditions upon which it was its *duty* to make the regulations, but that construction fails to give the language of the exemption its plain meaning.

This Court has many times held that the constitutional power vested in the Congress of the United States over Interstate Commerce gives Congress the right to regulate not only interstate transactions themselves but the authority to regulate production with a view to interstate transportation of the product. *Cloverleaf Butter Company v. Patterson*, 315 U. S. 148-179. Congress does not exercise its power to regulate the production of goods which are to be transported in interstate commerce until it first finds that the conditions under which these goods are being produced adversely affects interstate commerce. Yet, *it would not be contended that Congress did not have such power at all times*. It does have such power. Its *exercise of the power* is dependent upon the occurrence of conditions which necessitate its use. So, in the instant case, at all times after the passage of the Motor Carrier Act of 1935, the Interstate Commerce Commission *had the power* to regulate the maximum hours of service of the respondents in this case; it is true it could not exercise that power until it found that there was *a need for its use, but that did not affect the existence of the power*.

Fourthly, it is contended that the decision of the Eighth Circuit Court of Appeals accords with the administrator's interpretation (Interpretative Bulletin No. 9, par. 5) of Section 13 (b) (1). The equivocal nature of the administrator's interpretation of Section 13 (b) (1) as set forth in Interpretative Bulletin No. 9, together with the fact that the administrator failed to appeal from a District Court decision "otherwise" interpreting the said exemption has been heretofore pointed out in the original brief of petitioner, pages 14-15. In addition thereto we submit that the language of the exemption is unambiguous and under those circumstances the terms of the same cannot be enlarged or diminished by rulings of the administrator. In *Super-Cold Southwest Co. v. McBride*, 124 F. (2d) 90, the Circuit Court of Appeals of the Fifth Circuit, in an opinion written by Circuit Judge

HUTCHESON, in discussing another provision of the Fair Labor Standards Act exempting certain employees said:

"The act is unambiguous and operates to exempt all those coming within its terms *and these terms cannot be enlarged or diminished by rulings of the Administrator.*"

The following language from the opinion of Mr. Justice REED, in *United States v. American Trucking Association*, 310 U. S. 534-553, is particularly applicable to the interpretation of the exemption in controversy:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. *In such cases we have followed their plain meaning.*"

Conclusion.

It is, therefore, respectfully submitted that the decision of the Circuit Court of Appeals should be reversed.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 581.

SOUTHLAND GASOLINE COMPANY, PETITIONER,

VS.

**J. W. BAYLEY, HENRY V. BLOOM, G. C. KENDALL,
OWEN REDING AND W. J. BAYLEY,
RESPONDENTS.**

BRIEF OF RESPONDENTS.

**J. S. JAMESON,
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OWEN REDING AND W. J. BAYLEY,
RESPONDENTS.

BRIEF OF RESPONDENTS.

STATEMENT OF THE CASE.

On January 2, 1942, respondents herein, plaintiffs below, filed suit in the United States District Court for the Western District of Arkansas; to recover money they alleged was due them under Sections 6 and 7 of the Fair Labor Standards Act of 1938.

In their complaint, among other things, they allege that on October 24, 1938, and thereafter up to October 15, 1940, the Southland Gasoline Company, petitioner herein, was a private carrier and engaged in interstate commerce, and that they as employees of said petitioner company were engaged in interstate commerce and that they were subject

to the provisions of Sections 6 and 7 of said Act providing for minimum wages and maximum hours and allege that they have not been paid the amount to which they were entitled under the provisions of said Act (Rec. pp. 1-16).

On January 23, 1942, petitioner, defendant below, filed motion to dismiss the claims of said plaintiffs (Rec. pp. 17-18).

On February 27, 1942, the said District Court sustained petitioner's motion to dismiss respondents' claims for overtime compensation under Section 7 of said Act, holding that Section 13 (b) (1) of said Act excluded respondents from the provisions of Section 7 of said Act by the provision that Section 7 shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935, and that the fact that the Interstate Commerce Commission did not make a finding that a need existed to establish qualifications and maximum hours of service until May, 1940, was unimportant; and that the power to regulate such carriers was not dependent upon a prior finding of a need to regulate; and that the phrase, "if need therefor is found," is not a condition precedent to the exercise of the power granted the Commission by the Motor Carrier Act (Rec. pp. 19-21).

Respondents prosecuted their appeal from the decision of the District Court to the United States Circuit Court of Appeals for the Eighth Circuit. On November 2, 1942, the Circuit Court of Appeals rendered its decision, holding that until the Interstate Commerce Commission made a finding of necessity of regulation of private carriers with respect to matters specified in the Motor Carrier Act of 1935, it was without power to prescribe either qualifications or maximum hours for the employees of such carrier, and reversed the decision of the District Court and remanded the same (Rec. pp. 23-27).

POINTS ARGUED AND AUTHORITIES CITED.

Did the Interstate Commerce Commission have power to establish qualifications and maximum hours of service, pursuant to Section 204 of the Motor Carrier Act of 1935, for employees of private carriers by motor vehicle engaged in interstate commerce during the period of time between October 24, 1938, and May 1, 1940?

It is the contention of respondents that the phrase, "if need therefor is found," as used in Section 204 of the Motor Carrier Act, is a condition precedent to the exercise of power by the commission to establish for private carriers requirements and to prescribe qualifications and maximum hours of service for employees of private carriers.

AUTHORITIES.

Fair Labor Standards Act, Sections (7), 13 (b) (1).

Motor Carrier Act of 1935, Section 204.

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United States v. Katz, 271 U. S. 354.

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Morris Canal Co. v. Baird, 239 U. S. 126, 60 L. Ed. 177.

Wood v. Central Sand & Gravel Co., 33 F. Supp. 40.

ARGUMENT.

"Emphases are supplied."

The determination of the question involved in the case at bar rests upon the correct construction and interpretation of section 13 (b) (1) of the Fair Labor Standards Act of 1938 and section 204 of the Motor Carrier Act of 1935.

Section 13 (b) (1) of the Fair Labor Standards Act is as follows:

(b) "The provisions of section (7) shall not apply with respect to (1) *any employee* with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act."

Section 204 of the Motor Carrier Act of 1935 is as follows:

"(a) Powers and duties generally." It shall be the duty of the Commission:

(1) "To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications, and maximum hours of service of employees, and safety of operations and equipment."

(2) "To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts,

and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operations and equipment."

(3) "To establish for private carriers of property by motor vehicle, *if need therefor is found*, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term, 'motor carrier,' shall be construed to include private carriers of property by motor vehicle in the administration of section 304 (c), 305, 320, 322 (a), (b), (d), (f) and (g), and 324 of this chapter."

A careful reading and analysis of these two statutes and a comparison of subsections (1), (2) and (3) of the Motor Carrier Act will reveal that Congress determined for itself the necessity for regulating common and contract carriers. It did not determine the necessity of regulating private carriers but left the determination of that question to the Interstate Commerce Commission. The three subsections of said act, read together, clearly show that Congress intended that the power of the Commission to regulate private carriers should depend upon a formal finding of need therefor. Section 13 (b) (1) of the Fair Labor Standards Act evidently is not limited to the general power or jurisdiction of the Interstate Commerce Commission, but to the restricted or limited power as restricted and limited in subsection (3) of the Motor Carrier Act. The Circuit Court of Appeals discussed these statutes in its opinion and we refer to the same here. Rec. pp. 23-27.

Respondents respectfully urge that the language of subsection (3) of the Motor Carrier Act is clear, unambiguous and definite. The phrase "if need therefor is found" constitutes a condition which must be complied with before the Commission has any power to prescribe qualifications and maximum hours of service for private carriers. Congress must have intended that this phrase be given mean-

ing, because it is conspicuously absent from the subsections (1) and (2) of the Act. Congress evidently had this same interpretation in mind when writing section 13 (b) (1) of the Fair Labor Standards Act, for it is obvious Congress did not intend that the hundreds of thousands of employees of private carriers engaged in interstate commerce should be denied the protection of both the Fair Labor Standards Act and the Motor Carrier Act, and thus be subject to whatever oppressive and excessive hours of labor their employers should choose to impose upon them without any redress from any source whatsoever.

o The purpose of the Fair Labor Standards Act is to include within its protection every employee engaged in interstate commerce or in the production of goods for interstate commerce except those specifically exempted.

Bowie v. Gonzalez, 117 F. 2d 11.

Where a legislative body invests an administrative body or agency of the government with power to act on or in accordance with a hearing or a finding, such delegated power does not come into existence until the hearing or finding is had or the determination is made, and until such hearing or finding has been had or made such action is jurisdictional and action without it is void.

Panama Refining Co. v. Ryan, 293 U. S. 388-431.

United States v. B. & O. Ry. Co., 293 U. S. 454.

Mahler v. Eby, 264 U. S. 32, 44 S. Ct. 283.

Wichita B. R. & Light Co. v. Public Utilities Commission, 260 U. S. 48, 43 S. Ct. 55.

The general rule of construction of a statute of this nature is that coverage should be broadly interpreted and exemptions should be narrowly interpreted, and such statute being remedial the employer must bring himself within both the letter and the spirit of the exemption, since exemptions are subject to a strict construction.

Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52.

Morris Canal Co. v. Baird, 239 U. S. 126, 60 L. Ed. 177.

Wood v. Central Sand & Gravel Co., 33 F. Supp. 40.

United States v. Darby, 312 U. S. 100, 61 S. Ct. 451.

The Administrator's interpretations and rulings should be given great weight. In Interpretative Bulletin No. 9, paragraph 5, the Administrator construes the exemption not to include employees of private carriers until the Interstate Commerce Commission makes a finding of need to regulate such carriers.

United States v. American Trucking Ass'n, 310 U. S. 534.

Norwegian Nitrogen Prod. Co. v. United States, 288 U. S. 294, 324, 325, 53 S. Ct. 350.

Respondents respectfully urge that the phrase, "if need therefor is found," is a condition precedent to the power of the Commission to prescribe qualifications and maximum hours of service for employees of private carriers, and that the decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted,

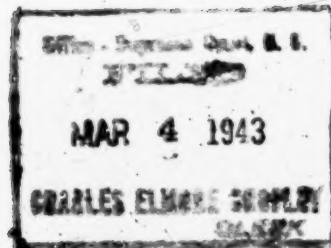
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FILE COPY



No. 581

In the Supreme Court of the United States

OCTOBER TERM, 1942

SOUTHLAND GASOLINE COMPANY, PETITIONER

v.

J. W. BAYLEY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE
WAGE AND HOUR DIVISION, UNITED STATES DEPART-
MENT OF LABOR, AS AMICUS CURIAE.

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE
WAGE-AND- HOUR DIVISION, UNITED STATES DEPART-
MENT OF LABOR, AS AMICUS CURIAE

The Solicitor General submits this brief on be-
half of the Administrator of the Wage and Hour
Division, United States Department of Labor, as
amicus curiae.

OPINIONS BELOW

The opinion of the District Court sustaining
petitioner's motion to dismiss the complaint (R.
22-26) is not officially reported. The opinion of
the Circuit Court of Appeals, reversing the de-
cision of the District Court (R. 34-39), is reported
in 131 F. (2d) 412.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 2, 1942 (R. 39). The petition for writ of certiorari was filed December 10, 1942, and granted January 18, 1943. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Section 13 (b) (1) of the Fair Labor Standards Act of 1938, truck drivers employed by a private carrier were excluded from the overtime provisions of the Act prior to May 1, 1940, the date on which the Interstate Commerce Commission made a finding of need to prescribe regulations of the hours of such drivers.

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act and the Motor Carrier Act, 1935, are quoted on pages 4-5, *infra*.

STATEMENT

Under Section 204 (a) of the Motor Carrier Act the Interstate Commerce Commission was authorized to prescribe maximum hours for employees of private carriers of property "if need therefor be found." On May 1, 1940, the Commission made a finding that there was need for federal regulation of private carriers to promote safety of operation, both with respect to the hours

of drivers and safety rules and regulations. *Ex Parte No. MC-3*, 23 M. C. C. 1, 42.

On January 2, 1942, respondents filed a complaint against petitioner under Section 16 (b) of the Fair Labor Standards Act. Respondents alleged that while employed by petitioner, a private carrier, and engaged as truck drivers in transporting goods across State lines "in commerce" during the period from October 24, 1938, to October 15, 1940, they had not been paid overtime compensation in accordance with the requirements of Section 7, and further that three of the respondents had not been paid the minimum wage rate provided for in Section 6 (R. 2-20). Petitioner filed a motion to dismiss the complaint in so far as the claims for overtime compensation under Section 7 were concerned, on the ground that the services of the respondents were exempt from Section 7 under the terms of Section 13 (b) (1) of the Act (R. 20-22). Petitioner's motion was granted by the District Court (R. 22-27).

On appeal respondents limited their claims under Section 7 to the period prior to May 1, 1940, the date of the Interstate Commerce Commission finding. The Circuit Court of Appeals reversed the District Court's judgment and held that Section 7 applied, prior to that date, to such employees of private carriers as were here involved (R. 34-39).

ARGUMENT

RESPONDENTS WERE SUBJECT TO THE FAIR LABOR STANDARDS ACT PRIOR TO THE MAY 1, 1940, FINDING OF THE INTERSTATE COMMERCE COMMISSION

The applicability of the Section 13 (b) (1) exemption depends on a proper interpretation of certain interrelated provisions of the Fair Labor Standards Act and the Motor Carrier Act.

Section 13 (b) (1) of the Fair Labor Standards Act provides that:

The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935.

The pertinent portions of Section 204 (a) of the Motor Carrier Act¹ provide that "it shall be the duty of the Interstate Commerce Commission—

(1) To regulate *common carriers* by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

¹ Act of Aug. 9, 1935, c. 498, 49 Stat. 543, 49 U. S. C. sec. 301.

(2) To regulate *contract carriers* by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for *private carriers* of property by motor vehicle, *if need therefor is found*, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. [Italics supplied.]

Concededly petitioner is neither a "common carrier by motor vehicle" as that term is defined in section 203 (a) (14) of the Motor Carrier Act, nor a "contract carrier by motor vehicle" as defined in section 203 (a) (15), but is rather, a "private carrier of property by motor vehicle."² (Petition for Writ of Certiorari, pp. 2, 7.)

As indicated by the italicized words in the above quotation, there is a distinct contrast between the wording of paragraphs (1) and (2) of

² Section 203 (a) (17) defines "private carrier" as follows: "any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

section 204 (a) and the wording of paragraph (3). In the former sections the power to prescribe maximum hours and other safety regulations is unconditionally conferred. In the latter, on the other hand, as the Interstate Commerce Commission itself has recognized, "the specific provision of section 204 (a) (3) requires a finding that there is need for such regulations as we may prescribe." *Ex Parte No. MC-3*, 23 M. C. C. 1, 12. This difference in statutory language was not without reason, as is clearly revealed by the legislative history of the Motor Carrier Act. This shows that in 1935 Congress refrained from granting the Interstate Commerce Commission an unqualified power to regulate employees of private carriers because there was insufficient information available to demonstrate the need for such special regulation in the interest of safety of operation.

There was no provision for the regulation of private carriers in the bills recommended by the Interstate Commerce Commission (S. Doc. 152, 73d Cong., 2d sess., 1934, appx. G, p. 350; H. Doc. 89, 74th Cong., 1st sess., 1935, appx. VII, p. 201). The only provision recommended by the Commission relating to private carriers was the general investigatory provision later enacted into law as

In its reports to Congress, the Commission pointed out that the bills it recommended "propose comprehensive regulation of the common carrier, a much less comprehensive type of regulation of the contract carrier, and no regulation of the private carrier." S. Doc. 152, *supra*, pp. 45-53. [Italics supplied.] Cf. H. Doc. 89, *supra*, p. 217.

Section 225.¹ Likewise the bills, as originally introduced in the 74th Congress, contained no provision for the regulation of private carriers (S. 1629, H. R. 5262, H. R. 6016, 74th Cong., 1st sess. 1935). Section 204(a)(3) first made its appearance in the bill which was reported from the Senate Committee in April 1935. The Committee Report drew specific attention to the limited and conditional nature of the provision relating to private carriers. The Report stated that "no regulation is proposed for private carriers except that an amendment adopted in committee authorizes the Commission to regulate the 'qualifications and maximum hours of service of employees and safety of operation and equipment' of private carriers of property by motor vehicle *in the event that the Commission determines there is need for such regulation.*" S. Rept. 482, p. 1, 74th Cong., 1st sess., 1935. [Italics supplied.] Senator Wheeler, sponsor of the bill and chairman of the committee, when explaining the terms of the act on the floor of the Senate, emphasized

¹ Section 225 provides: "The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter."

the fact that such regulation of private carriers "is conditioned upon a finding, after investigation, of need therefor" (79 Cong. Rec. at 5651).⁵

Section 13 (b) (1) of the Fair Labor Standards Act thereafter enacted in 1938 exempts from Section 7 of that Act employees with respect to whom "the Interstate Commerce Commission has power" to establish maximum hours under the Motor Carriers Act. As we have shown, the Interstate Commerce Commission cannot prescribe the hours of employees of private carriers unless "need therefor is found." Since it cannot, it has no actual "power" to do so until the necessary finding is made. If a body is authorized to undertake a certain activity only if a specified condition is met, the power to act may be said not to exist until the condition has been fulfilled. This Court has stated that a jurisdictional finding "is essential to the existence of authority" (*United States v. Balti-*

⁵ The Committee Report noted that "the most important difficulty in the way of legislation has been the absence of comprehensive data concerning the industry and the lack of specific information with respect to the details of regulation required in the public interest." S. Rept. 482, 74th Cong., 1st sess., 1935, p. 2. It was pointed out that there had been two recent investigations and reports by the Interstate Commerce Commission and the Federal Coordinator of Transportation, which enabled the formulation of legislation (*ibid.*). It is noteworthy that the investigations and reports referred to concerned primarily the need for regulation of common and contract carriers. There was virtually no evidence indicating what, if any, regulation for private carriers was needed (S. Doc. 152; H. Doc. 89, *supra*).

more & O. R. Co., 293 U. S. 454, 463) and "goes to the existence of the power" (*Mahler v. Eby*, 264 U. S. 32, 45). See also *Atchison, Topeka & Santa Fe Ry. v. United States*, 295 U. S. 193, 202.

We do not deny that the word "power" is susceptible of the broader interpretation urged by petitioner. As a matter of bare language it would not be inaccurate to assert that the Commission has "power" over the hours of employees of private carriers, even though such power may be exercised only under certain prescribed conditions. But, of course, especially when the meaning is ambiguous, the Court should interpret the provision in a manner consistent with the purposes Congress intended to achieve, and not so as to produce "absurd results," or a result "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Associations, Inc.*, 310 U. S. 534, 543. Application of these principles, we believe, demonstrates that the decision below is correct.

The exemption in Section 13 (b) (1) was adopted not for the purpose of freeing the hours of these employees from regulation otherwise clearly applicable under the Fair Labor Standards Act, but simply to avoid overlapping or conflicting regulation by different Government agencies. It is plain from the legislative debates that, while Congress was anxious to avoid simultaneous regu-

lation by two Government agencies, it was also very much concerned with insuring federal regulation of the hours of truck drivers. When an earlier amendment excepting employees of common carriers "subject to" the Motor Carrier Act was proposed,⁸¹ the chairman of the Senate Committee, in recommending the adoption of the exemptive provision, explained that "It was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such way as not to conflict with such regulation." 81 Cong. Rec. 7875 (1937). This was the only reason suggested for such an exemption, and when it was suggested, care was taken to emphasize that "the committee were of the opinion * * * that it was exceedingly important that the long hours of truck drivers should be regulated" by some Government agency (*ibid.*). The chairman of the committee supported the amendment to the committee's bill proposed on the floor on the representation that the Interstate Commerce Commission had actually exercised its power to fix maxi-

⁸¹ 81 Cong. Rec. 7875 (1937). The phrase "subject to * * * the Motor Carrier Act" in this predecessor to Section 13 (b) (1) would appear to be at least as broad as the language finally adopted. The present language of the exemption first appeared in the House Committee Print of December 14, 1937, but nothing occurring subsequent to that time throws any light upon the intention of Congress on the present problem.

man hours for truck drivers after the conclusion of the committee hearing (*ibid.*).¹

The interpretation adopted by the court below gives effect to this dual purpose of Congress. It precludes overlapping or conflicting regulation, and at the same time provides assurance that the hours of such employees will be regulated. No conflicting regulation can result because, as soon as the Interstate Commerce Commission announces its finding of need and thereby indicates its intention to prescribe regulations, the Fair Labor Standards Act automatically becomes inoperative as to such employees and there is substantial assurance of continuous regulation of their hours because the Interstate Commission is under a duty to prescribe regulations after it has made the finding of need.

Moreover, Section 204 (a) (3) of the Motor Carrier Act was not focussed upon the regulation of hours, as such. It authorized the Interstate Commerce Commission to establish "reasonable requirements to promote safety of operation," if it found need "therefor," and it was only to that end

¹ Although this debate took place on July 30, 1937, the Interstate Commerce Commission did not in fact fix maximum hours for the drivers of common and contract carriers until December 1937. *Ex parte No. MC-2*, 3 M. C. C. 665. The effective date of such regulations was then postponed from time to time so that they did not become effective for common and contract carriers of passengers until October 1, 1938, 6 M. C. C. 557; 11 M. C. C. 203, and for such carriers of property not until March 1, 1939, 11 M. C. C. 202.

that it was permitted to prescribe "qualifications and maximum hours of service of employees, and standards of equipment." Thus, under the Motor Carrier Act, the regulation of hours was to be only one aspect of a comprehensive system of regulation of private carriers, all with a view to promoting "safety of operation"; and ~~that~~ such regulation was to be adopted only if the Interstate Commerce Commission should find that it was necessary for reasons of safety. The Fair Labor Standards Act, on the other hand, applies to industry generally, and the regulation of hours is not a part of a larger pattern of regulation of the details of the employer's business with a view to achieving safety. Accordingly, the Fair Labor Standards Act was intended to have universal application except to the extent that hours were regulated under and integrated with the comprehensive scheme for promoting safety of operation under the Motor Carrier Act. But until the Interstate Commerce Commission had found the need for such regulation, there is no reason to believe that Congress intended to exclude employees of private carriers from the general benefits of the Fair Labor Standards Act.

The construction for which petitioner contends would defeat the basic purpose of the legislation as a whole and would leave wholly unregulated for indefinite periods the hours of a class of employees as to whom Congress has indicated

particular solicitude. The decision of the Fourth Circuit in the case of *Richardson v. James Gibbons Co.*, 6 Wage Hour Rept. 41, 42 (1942), petition for certiorari granted March 1, 1943, No. 725, criticized the decision of the Court of Appeals in the instant case on the ground that it "gives to coverage under the Fair Labor Standards Act a gap or hiatus in time, a kind of period of suspended animation to this same status of coverage." But it is rather the decision in the *Richardson* case which creates a really serious "gap or hiatus," leaving an important class of employees in interstate commerce indefinitely "without the protection of either Act" and "excepted from any regulation whatsoever." Cf. decision below, 131 F. (2d) 412, 414 (R. 38).^{*} Certainly there is much greater assurance of continuous regulation if the Fair Labor Standards Act is construed to be applicable at least until the Commission makes a finding of need than if the exemption is construed unconditionally.

^{*} The Administrator's present interpretation does leave open the possibility of a less serious "gap" in regulation, that is, the period between the Commission's finding of need and the effective date of regulations issued pursuant to the finding. For example, in the instant case, the Commission's regulations were not made effective until October 15, 1940, or five and a half months after the finding of need to regulate. The prospect of this "gap" led the Administrator previously to interpret the exemption as inapplicable until the Commission's regulations actually became effective. In-

The court in the *Richardson* case assumed that Congress was convinced the Commission would find it necessary to regulate private carriers and that "any other finding would have been little less than shocking to the American public." 6 Wage Hour Rept., at 42. We submit that the opposite conclusion is correct. The words "if need therefor is found" are meaningless if Congress was not in real doubt regarding such need for purposes of the Motor-Carrier Act. Under the terms of the statute and within the intent of Congress, the Commission could find that there was a need, in which case it would become empowered to regulate, or it could find that there was no need, in

Interpretative Bulletin No. 9, pars. 4 and 5 (c), 1942 Wage Hour Man. 378, 379. In his revision of Interpretative Bulletin No. 9, pars. 4 and 5 (a), issued March 1942, the Administrator announced that "while the matter is not entirely free from doubt," in view of the decisions of several lower courts disagreeing with the previous opinion, the Division would regard such employees as exempt from "the date on which the Commission found that a need exists." 5 Wage Hour Rept. 233.

It might well be concluded, in the light of the purpose of the legislation as a whole, that the Administrator's interpretation prior to March 1942 was correct. Some of the considerations which have led this Court to hold that State remedial legislation, not in conflict with Federal policy, remains effective despite Federal legislation until active assumption of jurisdiction by the Federal agency, lend support to this position. Cf. *Maurer v. Hamilton*, 309 U. S. 598; *Terminal R. R. Assn. v. Brotherhood of R. R. Trainmen*, No. 218 this Term, decided January 18, 1943.

which case it would be without power to regulate. The fact that the Commission made no finding on the subject for almost five years after the enactment of the Motor Carrier Act, and to date has made no final determination whether there is need to prescribe regulations for such employees, other than drivers (*Ex Parte No. MC-3*, 23 M. C. C. 1, 44; *Ex Parte No. MC-3*, 28 M. C. C. 125, 139), would seem to indicate that the need for such regulations under the Motor Carrier Act has not been so obvious.*

The decision below is in accord with the construction announced by the Administrator of the Wage and Hour Division in his interpretative bulletin on Section 13 (b) (1). (Interpretative

* The last cited opinion of the Commission, dated March 15, 1941, stated that "a further hearing will be held to determine what regulations, *if any*, should be prescribed for those employees, *other than drivers*, whom we have found subject to our jurisdiction" (28 M. C. C. 125, 139). [Italics supplied.] Although some further hearings were held on the subject in May 1941, the Commission has announced no further decision regarding the need for such regulations. The real possibility that the hours of these employees will remain unregulated indefinitely under the construction adopted by the Fourth Circuit and urged here by petitioner, is thus apparent. Unless the overtime provisions of the Fair Labor Standards Act apply to such employees of private carriers, their hours have been, and are still, wholly unregulated, although the hours of virtually all other employees engaged in interstate commerce or production of goods for interstate commerce have been regulated for more than four years now.

Bulletin No. 9, par. 5.)¹⁰ The Administrator, in the bulletin as originally issued in March 1939 and consistently thereafter, took the position that "at least * * * until an order is issued by the Commission finding the need for regulation, * * * employees of private carriers should be considered as not within the exemption provided by Section 13 (b) (1)." 1940 Wage Hour Man., par. 5, pp. 169-170; 1941 Wage Hour Man., par. 5, p. 294; 1942 Wage Hour Man., par. 5, p. 379. This interpretation is, of course, entitled to "great weight." *United States v. American Trucking Assns.*, 310 U. S. 534, 549; *Overnight Motor Co. v. Missel*, 316 U. S. 572, 580-581, n. 17.

Finally, the decision of the court below is sustained by the salutary principles of statutory construction requiring liberal interpretation of remedial legislation and strict limitation of exemptions. The Fair Labor Standards Act is a remedial statute of general application. Its purpose is to establish basic wage and hour standards "for health, efficiency, and general well-being of workers" engaged in interstate commerce or in the production of goods for interstate commerce, Section 2 (a); *United States v. Darby*, 312 U. S. 100, 109. Being

¹⁰ The interpretative bulletin was originally issued in March 1939 and was amended several times, primarily to indicate the effect of regulations issued by the Interstate Commerce Commission.

"remedial legislation," the Act "should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended." *Piedmont & Northern Ry. v. Interstate Commerce Comm.*, 286 U. S. 299, 311-312; *McDonald v. Thompson*, 305 U. S. 263, 266; *Spokane & Inland R. R. Co. v. United States*, 241 U. S. 344, 350.¹¹ The decision of the court below gives effect to these sound rules of statutory construction; the contention of petitioners ignores these principles, with the anomalous result that two statutes, each designed to regulate hours of employees, when construed together free them indefinitely from any regulation.

CONCLUSION

Since the interpretation of the court below is not inconsistent with the literal words of the statutes involved, and since it gives effect both to the purpose of the exemption and to the policy of the legislation as a whole, it is respectfully submitted that the de-

¹¹ For decisions of the Circuit Courts of Appeals applying these principles of statutory construction to the Fair Labor Standards Act, see *Bowie v. Gonzalez*, 117 F. (2d) 11, 16 (C. C. A. 1); *Fleming v. Palmer*, 123 F. (2d) 749, 762 (C. C. A. 1), certiorari denied, 316 U. S. 662; *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56 (C. C. A. 8); *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101, 106 (C. C. A. 9); *Fleming v. A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572 (C. C. A. 3) aff'd 316 U. S. 517.

cision of the Circuit Court of Appeals should be affirmed.

CHARLES FAHY,
Solicitor General.

ROBERT L. STERN,
Attorney.

IRVING J. LEVY,
Acting Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

FAYE BLACKBURN,
Attorney,

Department of Labor.

MARCH 1943.

SUPREME COURT OF THE UNITED STATES.

Nos. 581 and 725.—OCTOBER TERM, 1942.

Southland Gasoline Company, Petitioner, vs. J. W. Bayley, Henry V. Bloom, G. C. Kendall, et al.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
Wilson W. Richardson, Petitioner, vs. The James Gibbons Company.		
	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 3, 1943.]

Mr. Justice REED delivered the opinion of the Court.

By writs of certiorari these two cases were brought here to resolve the conflict between them over the proper interpretation of section 13(b)(1) of the Fair Labor Standards Act of 1938.¹

Section 7 of the Fair Labor Standards Act relates to the maximum number of hours per week an employer may employ an employee who is engaged in commerce or in the production of goods for commerce.² The scope of the exemption from the maximum hour standards granted by section 13(b)(1) in turn de-

¹ 52 Stat. 1660, 1068, § 13(b):

"The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act."

² The pertinent provisions of section 7 are as follows:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3), for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063.

pends upon the interpretation to be given section 204(a) of the Motor Carrier Act. The portions of that section which are important here are set out below.³

These cases turn upon the interpretation to be given the exemption by section 13(b)(1) of the Fair Labor Standards Act of employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." In the *Southland* case, the Circuit Court of Appeals for the Eighth Circuit construed this to exempt employees of private carriers of property from the requirements of the Fair Labor Standards Act only after the Interstate Commerce Commission has found need to establish maximum hours for such employees under the authority of section 204(a)(3) of the Motor Carrier Act. *Bayley v. Southland Gasoline Co.*, 131 F. 2d 412. The Fourth Circuit in the *Gibbons Company* case was of the opinion that "power" in section 13(b) meant the existence of the power and not its actual exercise. 132 F. 2d 627; cf. *Plunkett v. Abraham Bros. Packing Co.*, 129 F. 2d 419, 421, 42 C. A. 6.

The employers in both cases are concededly private carriers of property engaged in interstate commerce. All employees are subject to regulation to promote safety of operation under section 204(a)(3). In both cases the employees seek recovery solely for the failure of their employers to pay them the time and a half for overtime as required by section 7 of the Fair Labor Standards Act. There is no claim for unpaid overtime compensation after May 4, 1940, the date that the Interstate Commerce Commission first found need to establish reasonable requirements

³ 49 Stat. 543, 49 U. S. C. § 301:

"Sec. 204. (a) It shall be the duty of the Commission—

"1. To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"2. To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"3. To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment.

as to maximum hours to promote safety in the operations of private carriers of property by motor vehicle under section 204(a)(3).

The problem of statutory construction posed by this conflict of circuits should not be solved simply by a literal reading of the exemption section of the Fair Labor Standards Act and the delegation of power section of the Motor Carriers Act. Both sections are parts of important general statutes and their particular language should be construed in the light of the purposes which led to the enactment of the entire legislation. *United States v. American Trucking Ass'ns*, 310 U. S. 534, 542. The words of the sections under consideration are, however, basic data from which to draw the sections' meaning. Section 13(b)(1) exempts from the maximum hour limitation of the Fair Labor Standards Act those employees over whom the Interstate Commerce Commission "has power to" prescribe maximum hours of service. Section 204(a)(3) certainly gives "power to" the Commission to establish maximum hours for the employees here involved. There is a limitation on the authority delegated, urged here by the employees as a condition precedent to the existence of the power. This is that the Commission may establish maximum hours only "if need therefor is found." Since the employees seek unpaid overtime compensation only for the period prior to a finding of need by the Commission, the employees argue that no "power" existed in the Commission during the time for which compensation is claimed. We conclude to the contrary. The power to fix maximum hours has existed in the Commission since the enactment of the Motor Carrier Act in 1935. Before that power could be used, it was necessary to make a finding of need. Such a necessity, however, did not affect the existence of the power. Legislation frequently delegates power subject to a finding of need or necessity for its exercise.

The general purposes of the Fair Labor Standards Act and of the Motor Carrier Act do not point to a different conclusion. With the adoption of the Motor Carrier Act, the national government undertook the regulation of interstate motor transpor-

4 Cf. Federal Food, Drug and Cosmetic Act, § 401, 52 Stat. 1046, 21 U. S. C. 341; Emergency Price Control Act of 1942, § 2, 56 Stat. 24; Fair Labor Standards Act, § 8d, 52 Stat. 1064, 29 U. S. C. 208; Public Utility Holding Company Act of 1935, § 11, 49 Stat. 820, 15 U. S. C. 79(k); Tariff Act of 1930, § 350(a), 48 Stat. 943, 19 U. S. C. 1351; Alien Enemy Act, R. S. 4067, 50 U. S. C. § 21.

tation to secure the benefits of an efficient system. Safety through the establishment of maximum hours for drivers was an important consideration. *Maurer v. Hamilton*, 309 U. S. 598, 604, 607. When Congress later came to deal with wages and hours, its primary concern was that persons should not be permitted to take part in interstate commerce while operating with substandard labor conditions. *United States v. Darby*, 312 U. S. 100, 115. The Fair Labor Standards Act sought a reduction in hours to spread employment as well as to maintain health. *Overnight Motor Co. v. Missel*, 316 U. S. 572, 576, 577. By exempting the drivers of motors from the maximum hour limitations of the Fair Labor Standards Act, Congress evidently relied upon the Motor Carrier provisions to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime.

Not only does the language of section 13(b)(1) indicate this Congressional purpose but what slight evidence there is from the legislative history points to the same conclusion. The amendment was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers. No comment appears as to the desirability of statutory limitation on their hours prior to the establishment of maximum hours by the Commission. 81 Cong. Rec. 7875; 82 Cong. Rec. 1573 *et seq.* No distinction was pointed out between common, contract, and private carriers, although there was a distinction in section 204(a). It would seem that if the point now urged had been in the mind of Congress it would have itself expressed the intention to leave private carriers subject to the Fair Labor Standards Act until the Commission took action.⁵ Even under the argument of the employees, those drivers who work for common or contract carriers would not at any time be subject to the maximum hour provision of the Labor Act. Furthermore, it was said on the Senate floor that the amendment as to motor vehicle operators was to give them the exemption from the Fair Labor Standards Act enjoyed by the railway employers under the Hours of Service

⁵ An understanding that the Interstate Commerce Commission had already acted upon maximum hours for drivers may have shortened the discussion of the amendment. 81 Cong. Rec. 7875. Subsequent to this discussion and prior to the passage of the Labor Act, the Commission had acted for common and contract carriers. *Ex parte MC-2*, 3 M. C. C. 665, 690. Private carriers were held to need regulation by the decision of May 1, 1940, *Ex parte MC-3*, 23 M. C. C. 1.

Acts.⁶ These do not provide for overtime pay and like the subsections of section 204 of the Motor Carrier Act are immediately effective to exempt the railroad employees covered by their provisions from the maximum hour provisions of the Fair Labor Standards Act. Cf. note 1. Since the employees of contract and common motor carriers, as well as railway employees, are exempt from the Fair Labor Standards provisions for maximum hours by virtue of the same words which govern private motor carriers' employees, it would require definite evidence of a contrary Congressional purpose toward private carrier employees to lead us to accept the argument advanced here by the employees. No such evidence appears. *

No. 581, *Reversed.*

No. 725, *Affirmed.*

Mr. Justice MURPHY took no part in the consideration or decision of this case.

⁶81 Cong. Rec. 7875; 34 Stat. 1415, 39 Stat. 721.

* District Courts which have interpreted section 13(b)(1) have reached the same conclusion as we do. *Faulkner v. Little Rock Furniture Mfg. Co.*, 32 F. Supp. 590; *Bechtel v. Stillwater Milling Co.*, 33 F. Supp. 1010; *Fitzgerald v. Kroger Grocery & Baking Co.*, 45 F. Supp. 812; *Gibson v. Wilson & Co.*, 2 Federal Carriers Cases ¶ 9604; *Derer et al. v. Snow Ice, Inc.*, 3 Federal Carriers Cases ¶ 80,929. The Wage and Hour Division of the Department of Labor has taken the position that the Fair Labor Standards Act applies to drivers of private carriers until May 1, 1940, the date the Interstate Commerce Commission determined that need existed for their regulation. Interpretative Bull. No. 9, 5 Wage & Hour Rep. 233, 235, March 30, 1942.

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 725

WILSON W. RICHARDSON, PETITIONER,

vs.

THE JAMES GIBBONS COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1943.

CERTIORARI GRANTED MARCH 1, 1943.

[fols. 1-11]

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND**

Civil Action No. 1415

WILSON W. RICHARDSON, Plaintiff,

vs.

THE JAMES GIBBONS COMPANY, a body corporate, Defendant

STIPULATION OF FACTS—Filed 28th February, 1942

1. Plaintiff, Wilson W. Richardson, was employed by the Defendant company from October 24, 1938, to September 4, 1940, as a distributor-operator and a truck driver. His duties consisted of distributing and hauling asphalt. Plaintiff's testimony is to the effect that during the period in question he was employed approximately twenty-five per cent of the time as a truck driver and seventy-five per cent of the time as a distributor-operator. Defendant's testimony is that plaintiff was engaged in three general types of employment: (1) hauling sand and gravel during off-seasons on W. P. A. projects which occupied approximately five per cent of his time; (2) hauling asphalt for storage purposes which occupied approximately nine per cent of his time; (3) hauling and distributing asphalt which occupied the remainder of his time or eighty-six per cent. During the latter employment, defendant estimates that Plaintiff was employed approximately thirty per cent of the time in distributing the asphalt and seventy per cent in transporting same, but with this allocation of percentages Plaintiff does not agree.

2. The defendant owns a fleet of trucks and asphalt distributors with office and garages at Relay, Maryland. It is engaged in the general building and repairing of roads, driveways and aeroplane runways and other work where asphalt is used. Besides the ordinary trucks, it owns several asphalt distributor trucks, some of which are operated by one man, the driver or operator, who can operate the [fols. 12-23] levers and asphalt distributing appliances from the driver's seat. In the two-man trucks, one employee drives the truck and the other man operates the distributor machinery.

3. During the period in question, not less than forty-five loads of asphalt were transported for Defendant by the Plaintiff from the State of Maryland to points in Virginia and the District of Columbia.

4. The Defendant company qualified and has operated under the rules and regulations of the Interstate Commerce Commission since August 31, 1941.

5. All wages paid the Plaintiff were above the minimum wage.

Approved.

George A. Mahone, Wylie L. Ritchey, Attorneys for Plaintiff. O. Bowie Duckett, Jr., Attorney for Defendant.

[fol. 24] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH
CIRCUIT

No. 4964

WILSON W. RICHARDSON, Appellant,

VERSUS

THE JAMES GIBBONS COMPANY, a body corporate, Appellee

Appeal from the District Court of the United States for the
District of Maryland, at Baltimore

(Argued November 12 and 21, 1942. Decided December
26, 1942)

Before Parker, Sóper, and Dobie, Circuit Judges

George A. Mahone (Wylie L. Ritchey on brief) for Appellant; and O. Bowie Duckett, Jr., (Edward E. Hargest, Jr., and Alexius McGlannan, 3rd, on brief) for Appellee.

OPINION—Filed December 26, 1942

[fol. 25] DOBIE, Circuit Judge:

This was a civil action instituted by Wilson Richardson (hereinafter called Richardson) as plaintiff, against The James Gibbons Company (hereinafter called Gibbons) as

defendant, for alleged overtime compensation, for liquidated damages, and also for a reasonable attorney's fee. These claims were all based on the provisions of Section 16(b) of the *Fair Labor Standards Act* (Act of June 25, 1938, 29 U. S. C. A. §201 et seq.).

The District Judge sustained a motion of the defendant Gibbons to dismiss the action, holding that Richardson was not within the scope of the *Fair Labor Standards Act* by virtue of the terms of Section 13(b) of the Act (29 U. S. C. A. §213) which reads:

"The provisions of Section 207 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49; • • •"

Under the stipulation of facts filed in this case, "Richardson was employed by the Defendant Company from October 24, 1938, to September 4, 1940, as a distributor-operator and a truck driver. His duties consisted of distributing and hauling asphalt." Again, under the stipulation, according to the testimony of Richardson, he was employed, during the period in question "twenty-five per cent of the time as a truck driver and seventy-five per cent of the time as a distributor-operator"; while, according to the testimony of defendant, Richardson "was employed approximately thirty per cent of the time in distributing the asphalt and seventy per cent in transporting same."

The pertinent portions of the *Motor Carrier Act* are:

"Sec. 204(a). It shall be the duty of the Commission—

[fol. 26] "(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of

records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

“(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. . . .”

In *United States v. American Trucking Association*, 310 U. S. 534, it was held that Section 204(a) of the Motor Carrier Act applied only to those employees whose duties affect the safety of operation. We agree with the District Judge, in the instant case, that the duties of Richardson did affect the safety of operation. See *Faulkner v. Little Rock Manufacturing Co.*, 32 F. Supp. 590; *Bechtel v. Stillwater Milling Co.*, 33 F. Supp. 1010; *West v. Mountain Stages*, 40 F. Supp. 296; *Robbins v. Zabarsky*, 44 F. Supp. 867. See also, 130 A. L. R. 272, 132 A. L. R. 1443.

Nor are we impressed by Richardson's contention that “whatever driving of the truck, or trucks (upon which the Distributor Tank and Mechanism were mounted) that he did was but *incidental* to his main employment of ‘Distributor-Operator’ ” and that, therefore, he is within the provisions of the Fair Labor Standards Act, because “the Interstate Commerce Commission has not the power to establish for him, the plaintiff, qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor [fol. 27] Carrier Act of 1935.” See *Rozmus v. Jesse T. Davis & Sons Co.*, 23 N. Y. S. (2d) 821 (truck driver and delivery man, who also performed services about the yard where employer's business was conducted); *Garril v. Kraft Cheese Co.*, 42 F. (2d) 702 (driver-salesman of cheese and food products). The case of *State of Maryland v. Depew*, 175 Md. 274 has a setting so different from the instant case that the decision there is not helpful to the plaintiff. And the fact that the contents of the truck or trucks driven by Richardson, were liquid asphalt products, which, counsel for Richardson admits in his brief, are “flammable and explosive”, we think, brings his case even more clearly within the decision of the American Trucking Association's case, *supra*.

But a more serious question arises in this case. The District Judge, though he may have done so inferentially, did not, in granting the motion to dismiss, pass expressly upon

the question. At that time the case of *Bayley et als. v. Southland Gasoline Co.*, (C. C. A. 8, November 2, 1942) had not been decided.

The period of Richardson's employment by Gibbons extended from October 24, 1938, until September 4, 1940. The defendant, Gibbons, qualified and has operated under the rules and regulations of the Interstate Commerce Commission since August 31, 1941. The Interstate Commerce Commission did not actually undertake the regulation of private motor carriers until May 1, 1940, when it made its finding that the regulation of private motor carriers was needed.

In the *Bayley case, supra*, the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Riddick, after setting out the relevant provisions of the Motor Carrier Act (given above) said:

"It is apparent from a reading of the Motor Carrier Act that while the Congress determined for itself the necessity for the regulation of common and contract carriers by motor vehicle in the respects stated in the Act, it did not determine the necessity of regulating private carriers by motor vehicle, such as the appellee here, but left the de-[fol. 28] termination of that question to the Interstate Commerce Commission, if, in the words of the Act, 'need therefor is found.' Obviously the three subsections of the Act, read together, clearly imply the intention of Congress that the power of the Commission with respect to private carriers should depend upon a finding by the Commission that the regulation was needed; that is to say, needed in the public interest in order to make effective regulation of common and contract carriers which Congress commanded, and to protect the public and the common and contract carriers from the consequences of unregulated competition by private carriers."

Then, after discussing the intent and purpose of the *Fair Labor Standards Act*, Judge Riddick continued:

"We hold that until the Interstate Commerce Commission made the finding of the necessity of the regulation of private carriers with respect to the matters specified in the Motor Carrier Act of 1935, it was without power to prescribe either qualifications or maximum hours for the employees of such carriers."

With all due deference, and all proper respect, for the learning and authority of that Court, we, regretfully, cannot concur in the correctness of its decision or in the validity of the reasons advanced for that decision. We think the interpretation given in the *Bayley* case to the Fair Labor Standards Act and the Motor Carrier Act overlooks the keen interrelation of these two statutes and defeats the intents and purposes which Congress had in mind.

We are fully aware that the *Motor Carrier Act*, §204(a), gives absolute power to the Interstate Commerce Commission in paragraph (1) over common carriers by motor vehicle and in paragraph (2) over contract carriers by motor vehicle, while, as to private carriers of property by motor vehicle, there is in paragraph (3) the qualifying words "if need therefor is found". And such finding is necessary before any affirmative and binding action can be taken by the Commission. Nor do we lightly brush aside the interpretation placed on the Fair Labor Standards Act by the Ad-[fol. 29] ministrator in his Interpretative Bulletin No. 9. Yet we still think these considerations afford no valid basis for the *Bayley* decision.

The real question here is the meaning of the word "power" in Section 13(b) of the *Fair Labor Standards Act*. Congress, we think, meant the *existence* of the power not its *actual exercise*. The Fair Labor Standards Act was enacted after the Motor Carrier Act, and the later statute, we believe, intended to draw a line of cleavage between those cases on which the Interstate Commerce Commission could take action and those cases on which it could not. The restricted definition of the word "employee" in *United States v. American Trucking Association*, 310 U. S. 534, would seem to lend color to this view, and we think we find in that opinion a reflection of the philosophy of the Fair Labor Standards Act and the Motor Carrier Act to which we adhere.

We cordially agree with the opinion in the *Bayley* case that the Fair Labor Standards Act, as a remedial statute, must be liberally construed. This we developed at some length in *Missel v. Overnight Transportation Co.*, 126 F. (2d) 98. But *salus populi suprema lex esto* and we should be equally careful not to restrict unduly any federal statute which, in the interest of public safety, undertakes to clothe the Interstate Commerce Commission with power to encompass so worthy an end. The vast importance of the private carrier of goods by motor vehicle is too well known

to require comment. Congress must have appreciated this. We think, accordingly, that Congress was pretty well convinced that the Interstate Commerce Commission would (as it did) make a finding of the necessity of regulating these carriers. Any other finding would have been little less than shocking to the American public.

The Bayley decision gives to coverage under the Fair Labor Standards Act a gap or hiatus in time, a kind of period of suspended animation to this same status of coverage. It makes certain employees subject to this Act and then, a moment later when the Interstate Commerce Commission has made the finding of necessity, the coverage of [fol. 30] the Act suddenly ceases. We hesitate to think that Congress deliberately undertook to bring about such a situation, with all the pains, penalties and uncertainties thereunto appertaining. Again the Fair Labor Standards Act was never drawn with the idea of making a complete coverage of all employees engaged in interstate transportation. By its terms a number of exceptions are made, such as fishermen and farmers.

Our own researches, and those of counsel, have failed to turn up any decision of a Circuit Court of Appeals, with the exception of the *Bayley case*, passing directly on the instant question. Under these circumstances, we advert briefly to opinions in the federal District Courts, all of which buttress the stand we take in the instant case.

The District Judge in the *Bayley case* (overruled by the Circuit Court of Appeals) held expressly that the power of the Interstate Commerce Commission to regulate private carriers was not dependent upon a prior finding by the Commission that such regulation was necessary. In *Faulkner v. Little Rock Manufacturing Co.*, 32 F. Supp. 590, 591, District Judge Trimble (E. D. Arkansas) said:

“ * * * It appearing that under the provisions of Section 304 (a) (3), Congress has delegated to the Interstate Commerce Commission the power to make regulations for qualifications and the maximum hours of service for such employees, the whole field is occupied and it further appearing that under the provisions of the Fair Labor Standards Act of 1938 as amended the regulation of qualifications and maximum hours of service of employees with respect to whom the Interstate Commerce Commission has

power to establish qualifications and maximum hours of service' have been exempted from the provisions of the Fair Labor Standards Act of 1939, there is and could be no reservation of power to the administrator of the Fair Labor Standards Act of 1938 to act until such time as the Interstate Commerce Commission shall see fit to act."

The first two head-notes to *Bechtel v. Stillwater Mining Co.*, 33 F. Supp. 1010, (District Judge Vaught, E. D. Oklahoma) read:

[fol. 31] "Under Motor Carrier Act authorizing Interstate Commerce Commission to prescribe maximum hours of service of employees if need therefor is found, failure of commission to prescribe maximum hours of service of employees does not divest the commission of power granted to it by Congress.

"Under Motor Carrier Act authorizing Interstate Commerce Commission to prescribe maximum hours of service of employees of private motor carriers, 'if need therefor is found', the quoted expression is a limitation on the commission in prescribing maximum hours of service but is not a limitation on the power granted by Congress to the commission."

In *West v. Smoky Mountain Stages*, 40 F. Supp. 296, 298-299, District Judge Underwood (N. D. Georgia) stated:

"* * * The fact that the Interstate Commerce Commission may not have assumed jurisdiction over mechanics prior to this suit is immaterial. The exemption of employees from application of the Fair Labor Standards Act is not made, by Section 13 (b) of the Act, to depend upon the exercise of power over them by the Interstate Commerce Commission but merely upon the existence of 'power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 (304 of Title 49) of the Motor Carriers Act'. The evidence in this case establishes the fact that the Interstate Commerce Commission had this power and that fact excludes jurisdiction of the administrator over the plaintiff's activities and the Fair Labor Standards Act was, therefore, not applicable in the plaintiff's situation and no cause of action is set forth in his petition."

Said District Judge Campbell (N. D. Illinois) in *Garril v. Kraft Cheese Co.*, 42 F. Supp. 702, 705:

"Accordingly, the exemption contained in Section 13(b) (1) of the Fair Labor Standards Act applies to the plaintiffs in this case and they are excluded from the provisions of Section 7 of the same Act. The fact that the order of the Interstate Commerce Commission establishing such qualifications and maximum hours of service did not become effective until October 15, 1940, is immaterial. The deter-[fol. 32-35] mining factor in applying the exemption is whether or not the Interstate Commerce Commission 'has power' to establish such qualifications and maximum hours of service. There is no question that since the plaintiffs in this case are engaged in interstate commerce that the Interstate Commerce Commission does have that power and, therefore, the exemption applies regardless of the time at which the Commission exercises such power."

And District Judge Ford, (D. Massachusetts) in *Robbins v. Zabarsky*, 44 F. Supp. 867, 870, crisply held:

"If the Interstate Commerce Commission has the power to fix maximum hours for a given employee, the Fair Labor Standards Act is not applicable to him, regardless of whether or not the Commission has exercised the power. That is the plain language of Section 13(b) (1) and the construction by the courts has followed it."

Also, compare the language of District Judge Barksdale (W. D. Virginia) in *Magann v. Long's Baggage Transfer Co.*, 39 F. Supp. 742, 749, 750, citing the *Bechtel and Faulkner cases*, *supra*.

The judgment of the District Court is affirmed.

Affirmed.

[fol. 36]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,

Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is the entire original transcript of the record from the District Court of the United States for the District

of Maryland, and a true copy of the entire proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the entire record and proceedings in the said Circuit Court of Appeals in said cause.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 22nd day of January, A. D. 1943.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

(4881)

Petition not placed

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

D

No. 725

WILSON W. RICHARDSON,

Petitioner,

vs.

THE JAMES GIBBONS COMPANY, A BODY CORPORATE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

GEORGE A. MAHONE,
Attorney for Petitioner.

WYLLIE L. RITCHIEY,
Of Counsel.

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BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the District Court granting defendant's Motion to dismiss was filed March 17, 1942, and is not reported; the opinion and judgment of the Circuit Court of Appeals affirming the decision of the District Court were rendered December 26, 1942, — Fed. (2d) — (R. 2).

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under section 240 (a) of the Judicial Code as amended (28 U. S. C. A. 347). Petition for a stay of the mandate pend-

ing this application for a review of the judgment of the Circuit Court of Appeals was duly made, and allowed on January 13, 1943. On March 1, 1943, this Honorable Court granted the writ of certiorari for which petitioner had made application.

Statement of the Case.

This action arises under the Fair Labor Standards Act of 1938, chapter 676, 52 Stat.; U. S. C. Title 29, Section 201 et seq. Section 13 (b) (1) of said Act provides for certain exemptions with respect to employees who may be subject to the provisions of Section 204 of the Motor Carrier Act, 1935 (now Interstate Commerce Act, Part II); this latter Act is also involved in the questions presented. The relevant provisions of these statutes are set forth in the Appendix.

The case was tried on complaint, motion to dismiss, amendment to the complaint, amended motion to dismiss and stipulation of certain facts by the parties. The following are the essential facts:

Wilson W. Richardson brought this suit under the Fair Labor Standards Act for unpaid overtime compensation alleged to be due him for hours worked in excess of the maximum number prescribed in section 7 (a) of the Act, for an additional equal amount as liquidated damages, court costs, and reasonable attorney's fee, as provided in section 16 (b) of the Act. He was employed at a regular fixed weekly salary. In some few weeks during the off-seasons he worked less than the number fixed in section 7 (a) of the Act and in the great majority of other weeks he worked considerably in excess of that number. He was paid a uniform salary regardless of whether his days required short or long hours. His on-duty hours were regulated by the amount of work required to be done. He began his employ-

ment with respondent several years prior to the effective date of the Act, October 24, 1938, and remained in its employ until September 4, 1940.

Petitioner was employed as a "distributor-operator" and as such operated a tank truck from which he distributed hot asphalt preparations to finish roads or other surfaces.

Respondent is engaged in the general building and repairing of roads, driveways, airplane runways, and other work where asphalt preparations are used, and in connection with its business owns a fleet of trucks and asphalt distributors. Some of the asphalt distributors are operated by one man; the driver or operator, handling levers and asphalt distributing appliances from the driver's seat; other distributor trucks are two-man trucks in which the helper drives the truck and the distributor-operator operates the distributing machinery. Petitioner worked on both types of trucks. Respondent is a private carrier of its own property in interstate commerce by motor vehicle. Respondent has qualified and operated under the rules and regulations of the Interstate Commerce Commission since August 31, 1941.

This case covers a period of approximately two years employment from October 24, 1938, to September 4, 1940. Petitioner was on duty from a minimum of approximately 40 hours a week during slack periods to a usual maximum during busy seasons of approximately 85 hours per week.

Specification of Errors.

I.

The court below erred in holding that the Interstate Commerce Commission had jurisdiction over petitioner prior to a finding by the Commission that the need existed for the regulation of private carriers by motor vehicle.

II.

The court below erred in holding, as to private carriers by motor vehicle, that the word "power" in section 13 (b) of the Fair Labor Standards Act means the existence of the power and not its actual exercise.

III.

The court below erred in *not* holding that whatever driving of the trucks the petitioner did was but incidental to his main employment as a "Distributor-Operator", and that, therefore, he is within the provisions of the Fair Labor Standards Act.

ARGUMENT.

The contention in this case rests, substantially, upon the following:

Was the petitioner, at and during the time of his employment by the respondent, October 24, 1938, to September 4, 1940, under the jurisdiction of the Interstate Commerce Commission by reason of the Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act), Section 204 (a) (3), or was he entitled to claim the protection and benefits of the Fair Labor Standards Act of 1938, Section 7 (a)?

In the Fair Labor Standards Act of 1938, under the caption of "Exemptions", we find that Section 13 (b) provides (so far as pertinent to this proceeding):

"The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935;"

Section 204 (a) (3), of the Motor Carrier Act of 1935, touching upon private carriers of property by motor vehicle (and respondent is such a Private Carrier) provides that it shall be the duty of the Commission

"To establish for private carriers of property by motor vehicle, *if need therefor is found*, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. *In the event such* requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of sections 204 (d) and (e) * * * etc. (Italics supplied.)

The Circuit Court of Appeals for the Fourth Circuit states in its opinion, in this case (decided Dec. 26, 1942, — Fed. (2d) —):

"In *United States v. American Trucking Association*, 310 U. S. 534, it was held that Section 204 (a) of the Motor Carrier Act applied only to those employees whose duties affect the safety of operation. We agree with the District Judge, in the instant case, that the duties of Richardson did affect the safety of operation."

It is submitted that the citation of the American Trucking Association decision, *supra*, by the Circuit Court of Appeals is not in point, for the reason that this Honorable Court in said case did not rule as to "employees of private carriers", but its decision was limited to "employees of common or contract carriers". In the closing portion of this Honorable Court's decision in the *American Trucking Association* case, *supra*, in the last sentence of the paragraph preceding the caption "*Conclusion*" it is stated:

"It seems equally evident that where these vehicles or operators were *common or contract* carriers, it was not intended by Congress to give the Commission power

to regulate the qualifications and hours of service of employees, other than those concerned with the safety of operations." (Italics supplied.)

And under the caption "*Conclusion*" it is set forth:

"Our conclusion, in view of the circumstances set out in this opinion, is that the *meaning of employees in Section 204 (a) (1) and (2)* is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications of hours of service of any others." (Italics supplied.)

The instant question, so far as diligent search by counsel reveals, has been passed upon by only two Circuit Courts of Appeal; the Eighth and the Fourth Circuits.

In *Bayley, et al. v. Southland Gasoline Co.* (C. C. A. 8th), decided November 2, 1942, — Fed. (2d) —, the court said:

"It is apparent from a reading of the Motor Carrier Act that while the Congress determined for itself the necessity for the regulation of common and contract carriers by motor vehicle in the respects stated in the Act, it did not determine the necessity of regulating private carriers by motor vehicle, such as the appellee here, but left the determination of that question to the Interstate Commerce Commission, if, in the words of the Act, 'need therefor is found.' Obviously the three subsections of the Act" (subsections (1) (2) (3) of Section 204 (a)) "read together, clearly imply the intention of Congress that the power of the Commission with respect to private carriers should depend upon a finding by the Commission that the regulation was needed:"

Then after discussing the intent and purpose of the Fair Labor Standards Act, the court (C. C. A. 8th) continues:

"We hold that until the Interstate Commerce Commission made the finding of the necessity of the regula-

tion of private carriers with respect to the matters specified in the Motor Carrier Act of 1935, it was without power to prescribe either qualifications or maximum hours for the employees of such carriers." (Bayley et al. v. Southland Gasoline Co. supra.)

The Circuit Court of Appeals for the Fourth Circuit holds that the Interstate Commerce Commission had "power" over the petitioner without the necessity for such a finding as is set forth in section 204 (a) (3) of the Motor Carrier Act of 1935. With this conclusion petitioner disagrees and holds that the decision in the *Bayley* case, supra, is the correct statement of the law.

Delegation of Legislative Power—Due Process.

In *Panama Refining Co. v. Ryan, et al.*, 293 U. S. 388, this Honorable Court stated, in part, at page 432:

"To repeat, we are concerned with the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board, or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, *and if that authority depends on determinations of fact, those determinations must be shown.* (Italics supplied.) As this Court said in *Wiebita Railroad & Light Co. v. Public Utilities Comm.*, in 260 U. S. 48, 59, .

"In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, *such an Administrative agency is required as a*

condition precedent to an order to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective." (Italics supplied.)

Section 204 (a), (3) of the Motor Carrier Act of 1935 delegates no power to the Interstate Commerce Commission over "private carriers" unless a "need therefor is found". This obviously connotes findings of fact to ascertain such a "need"; thus a precedent thing is to be done before the Commission takes jurisdiction or its power attaches (see *Panama Refining Co. v. Ryan, supra*).

As a matter of fact and of record the Interstate Commerce Commission did not make effective until October 15, 1940 (after petitioner had left employment of respondent), its Order assuming jurisdiction over private carriers.

On May 1, 1940 (I. C. C. Reports, Motor Carrier Cases Vol. 23, page 1), Ex Parte MC-3, the Commission decided a need was found for Federal Regulation of private carriers, and (page 44) stated an appropriate order giving effect to the findings would be entered. However, a number of postponements were made, and on September 30, 1940,

On May 1, 1940 (I. C. C. Reports, Motor Carrier Cases, Vol. 26, page 205) Ex Parte MC-3, in connection with regulations to promote safety of operations of private carriers of property in interstate commerce, stated at page 208, last paragraph:

"Our Order of May 1, 1940, should be vacated and set aside and a new order based on the findings made in our report of May 1, 1940, as modified by this report, should be entered effective October 15, 1940."

Another aspect of this case relates to the duties performed by petitioner for respondent as a "Distributor-Operator", and the incidental work done by petitioner in driving the trucks. Petitioner operated the machinery of the "Dis-

tributor" mounted on the truck chassis and at times acted as driver of the trucks. His work in operating the machinery of the "Distributor" was that of a technician; his work in driving the trucks, that of a Chauffeur. Was the incidental chauffeuring sufficient to take him without the protection and deprive him of the benefits of the Fair Labor Standards Act; petitioner holds that it was not. Petitioner suggests that the liberal interpretation of the Fair Labor Standards Act of 1938, as indicated in the opinions of the District Court and the Circuit Court of Appeals, defeats the remedial purposes and intent of said Act, one of which was to insure employees, engaged in "commerce", overtime compensation for hours worked in excess of the legal maxima set forth in that statute.

Statutes are not to be so literally construed as to defeat the purpose of the legislature.

U. S. use of Hill v. American Surety Co., 200 U. S. 197.

Exceptions from a general policy which a law embodies should be strictly construed; that is, they should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment.

Spokane & I. E. R. Co. v. U. S., 241 U. S. 344.

Conclusion.

Wherefore, it is respectfully submitted that the judgment of the court below was in error and should be reversed.

Respectfully submitted,

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Attorney for Petitioner.

WYLIE L. RITCHIE,
Of Counsel.

March 9th, 1943.

APPENDIX.

Fair Labor Standards Act of 1938.

Section 13 (b) * * * "The provisions of Section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935; * * *

Motor Carrier Act of 1935.

"Sec. 204 (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of section 204 (d)

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BRIEF OF RESPONDENT.

✓ O. BOWIE DUCKETT, JR.,
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79 Cong. Record 12205	14
79 Cong. Record 12228	15
81 Cong. Record 7875	6, 12
Crawford on Statutory Construction, Sections 158 and 185	7
Sharfman, The Interstate Commerce Commission, Vol. 4	15
Sutherland on Statutory Construction, 2d Ed., Sec. 366	7
Wagner, A Legislative History of the Motor Carrier Act, 1935	15

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 725.

WILSON W. RICHARDSON,
Petitioner,
vs.

THE JAMES GIBBONS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

This is an action instituted by Wilson W. Richardson, a former employee, against his employer, The James Gibbons Company, for alleged overtime compensation, liquidated damages and attorney's fee under the Fair Labor Standards Act of 1938. The question of minimum wages is not involved as petitioner concedes his wages were above the minimum. The Maryland District Court, as well as the Circuit Court of Appeals for the Fourth Circuit, held that the employee was exempted as his hours of service were controlled by the Interstate Commerce Commission.

The opinion of the Circuit Court of Appeals (R. 2-9) is reported in 132 Fed. 2d 627. The opinion of the District Court is not reported.

The facts are set forth in the stipulation (R. 1-2) and also in the Circuit Court's opinion (R. 2-3).

Briefly, the Petitioner, Wilson W. Richardson, was employed by the Respondent as a truck driver and distributor-operator from October 24, 1938 to September 4, 1940. His duties consisted of transporting and distributing asphalt which was used in the building and repairing of roads, driveways, airplane runways, etc. There was a conflict in the testimony as to the amount of time Petitioner was engaged as a truck driver and as a distributor-operator. Petitioner's testimony was to the effect that during the period in question he was employed approximately twenty-five per cent. of the time as a truck driver and seventy-five per cent. of the time as a distributor-operator. Respondent's testimony was that Petitioner was employed approximately seventy-four per cent. of his time as a truck driver and twenty-six per cent. of his time in distributing the asphalt.

Some of the facts set forth by Petitioner in his brief are not entirely correct and not included within the stipulation of facts agreed to by the parties. For example, petitioner says in his brief (page 3) that he was on duty "from a minimum of approximately forty hours a week during slack periods to a usual maximum during busy periods of approximately eighty-five hours per week." Such testimony does not appear in the stipulation of facts and is denied by Respondent.

SUMMARY.

Petitioner's sole argument in the District Court was addressed to the proposition that his truck driving was merely incidental to his main employment as distributor-operator and that as the latter duty did not affect safety of operation, he was not covered by the Act. The Circuit Court had little trouble in disposing of this contention (R. 4) and Petitioner makes little mention of same in his brief (page 8).

The important question is to determine whether the overtime provision of the Fair Labor Standards Act applied after the Interstate Commerce Commission had been given the power to regulate this class of employees.

The pertinent parts of the two statutes in question are Section 13 (b) of the Fair Labor Standards Act of 1938, which provides:

"The provisions of Section 207 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49 . . ."

and Section 304 (a) (3) of Title 49 (Motor Carrier Act of 1935), which provides:

"(a) It shall be the duty of the Commission . . .

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees and standards of equipment . . ."

Under these interrelated statutes Respondent contends:

(1) The activities as a truck driver and distributor-operator of asphalt distributing trucks affects safety of operation as announced by this Honorable Court in the

case of U. S. v. American Trucking Association, Inc., 310 U. S. 534.

(2) Petitioner was not subject to the overtime provisions of the Fair Labor Standards Act because:

- (a) The language of the exemption statute is plain and unambiguous and the purpose and intent of the Act does not warrant a strained construction.
- (b) It was not the intention of Congress to postpone jurisdiction over drivers of private carriers until regulations had been adopted by the Interstate Commerce Commission.

ARGUMENT.

1.

THE ACTIVITIES OF A TRUCK DRIVER AND A DISTRIBUTOR-OPERATOR AFFECTS SAFETY OF OPERATION.

Petitioner in his brief (page 8) contends that the driving of the trucks was merely incidental to his duties as a distributor-operator. The facts do not bear out this contention. Petitioner admits that he was employed approximately twenty-five per cent. of his time as a truck driver (R. 1). The more exact information furnished by the employer showed that the plaintiff was engaged approximately seventy-four per cent. of his time as a driver and the remaining twenty-six per cent. as a distributor. His duties as a driver or chauffeur, therefore, cannot be said to be incidental.

The Circuit Court had no difficulty with the point and said, 132 Fed. 2d p. 638: (R. 4)

"Nor are we impressed by Richardson's contention that whatever driving of the truck, or trucks (upon which the Distributor Tank and Mechanism were mounted) that he did was but incidental to his main employment of 'Distributor-Operator' and that, there-

fore, he is within the provisions of the Fair Labor Standards Act, because 'the Interstate Commerce Commission has not the power to establish for him, the plaintiff, qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935.' See *Rozmus v. Jesse T. Davis & Sons Co.*, 23 N. Y. S. 2d 821 (truck driver and delivery man, who also performed services about the yard where employer's business was conducted); *Gavril v. Kraft Cheese Co.*, D. C., 42 F. Supp. 702 (driver-salesman) of cheese and food products . . . And the fact that the contents of the truck or trucks driven by Richardson, were liquid asphalt products, which, counsel for Richardson admits in his brief, are 'flammable and explosive', we think, brings his case even more clearly within the decision of the American Trucking Association's case, *supra*."

Necessarily these tank trucks were driven over the highways in delivering the asphalt. Even while distributing the asphalt in repairing and resurfacing the roads (as contrasted with new construction), it was necessary to operate the trucks over the highways. Add to this the fact that the commodity transported in the truck was flammable and explosive and there can be little question that Petitioner's activities affected safety of operation as laid down by Mr. Justice Reed for this Court in the case of *U. S. v. American Trucking Association, Inc.*, *supra*.

2.

PETITIONER WAS NOT SUBJECT TO THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT BECAUSE THE LANGUAGE OF THE EXEMPTION SECTION IS PLAIN AND UNAMBIGUOUS AND THE PURPOSE AND INTENT OF THE ACT DOES NOT WARRANT A STRAINED CONSTRUCTION.

In considering this question, we must start with the following propositions: (a) That the petitioner had the burden of showing error in the judgment which he asks

this Court to set aside;¹ (b) that practically all available authority, including two Circuit Courts of Appeals, have decided the question against the Petitioner;² (c) that the plain language of the statute and the intent of Congress clearly support Respondent's contention; (d) that a decision by the Court at this late date placing drivers of private carriers under Fair Labor Standards Act would not affect safety as said drivers have been definitely excluded since May 1, 1940.

Section 13 (b) of the Act provides that overtime compensation shall not apply to any employee with respect to whom the Interstate Commerce Commission *has power* to establish qualifications and maximum hours of service pursuant to the provisions of the Motor Carrier Act. This Act was passed after the Motor Carrier Act and the debates and discussion show that Congress was entirely acquainted with the prior Act.³

In the interpretation of statutes, it is, of course, the function of the courts to construe the language so as to give effect to the intent of Congress⁴ and it is elementary that the intention of the Legislature or the meaning of the statute must in the first instance be sought from the lan-

¹ Higgins v. Carr Bros. Co., 87 L. Ed. 398, decided January 18, 1943.

² Richardson v. The James Gibbons Co., 132 Fed. 2d 627, C. C. A. 4th; Plunkett v. Abraham Bros. Packing Co., 129 Fed. 2d 419, C. C. A. 6th; Faulkner v. Little Rock Mfg. Co., 32 Fed. Supp. 590 (E. D. Ark.); Bechtel v. Stillwater Mining Co., 33 Fed. Supp. 1010 (E. D. Okla.); West v. Smoky Mountain Stages, 40 Fed. Supp. 296 (N. D. Ga.); Gavril v. Kraft Cheese Co., 42 Fed. Supp. 702; Robins v. Zabarsky, 44 Fed. Supp. 867 (D. C. Mass.); Magann v. Long's Baggage Transfer Co., 39 Fed. Supp. 742; McDaniel v. Clavin, (Cal. D. Ct. of Appeals) 128 Pac. 2d 821; Dallum, et al., v. Farmers Cooperative Trucking Association (D. C. Minn.), 46 Fed. Supp. 785; Gerdert, et al., v. Certified Poultry and Egg Co. (D. C. So. D. Fla.), 38 Fed. Supp. 964; Fitzgerald, et al., v. Kroger Grocery and Baking Co. (D. C. Kan.), 45 Fed. Supp. 812; Corbett v. Schlumberger Well Surveying Corp. (D. C. S. D. Tex.), 43 Fed. Supp. 606; Gibson v. Wilson & Co., 4 Labor Cases 60466 (D. C. W. D. Tenn.); Anuchick, et al., v. Trans. Freight Lines, Inc., 46 F. Supp. 861 (D. C. E. D. Mich.). Contra, Bayley, et al., v. Southland Gasoline Co., 131 Fed. 2d 412 (C. C. A. 8th).

³ 81 Congressional Record 7875, etc.

⁴ U. S. v. American Trucking Association, Inc., *supra*, p. 542.

guage used in the statute. If that language is plain and does not lead to absurd or impractical results, the sole function of the courts is to enforce it according to its terms.⁵

If Congress had not intended the exemption to apply until the Interstate Commerce Commission not only found a need for the regulation of private carriers but actually passed a final order,⁶ the words "power to" are superfluous. In other words, the statute should have read: "The provisions of Section 207 shall not apply to any employee with respect to whom the Interstate Commerce Commission has established qualifications and maximum hours, etc."

Statutory words are presumed, unless the contrary appears, to be used in their ordinary or usual sense. The ordinary meaning of the word "power", namely, "the right, ability or facility of doing something,"⁷ supports the interpretation placed upon the statute not only by the Respond-

⁵ *Caminetti v. U. S.*, 242 U. S. 470; 61 L. Ed. 442; *Sutherland on Statutory Construction*, 2d Ed., Sec. 300, p. 698; *Crawford on Statutory Construction* (1940 Ed.), p. 244, Sec. 158, p. 315, Sec. 185, and cases cited under note No. 18, *U. S. v. American Trucking Ass'n., Inc.*, supra, p. 543.

⁶ The Interstate Commerce Commission from the beginning realized there was a need for regulating private carriers. In this regards, it should be noted that the Commission on July 30, 1936 instituted an investigation for the purpose of ascertaining the facts respecting the hours of service of employees in motor carrier transportation for the three classes of carriers provided for in Section 204 of the Act. After the investigation was started, the Commission found it impossible at that time to investigate the maximum hours of service of employees of private carriers and said that said investigation would be undertaken as soon as possible. *Interstate Commerce Commission Reports, Motor Carrier Cases, Vol. 3, p. 605*. Subsequently, on May 9, 1939, the Commission said that it was clear that they had the power to prescribe qualifications and maximum hours for drivers and their helpers employed by private carriers of property. *Interstate Commerce Commission Reports, Motor Carrier Cases, Vol. 13, p. 481*. On May 1, 1940, the Commission formally held that there was a need for federal regulation of private carriers but that certain safety regulations would not be made applicable to same until Congress appropriated additional funds for that purpose. *I. C. C. Reports, Motor Carrier Cases, Vol. 23, p. 1, at p. 35*. After a number of postponements, on Sept. 30, 1940, the Commission vacated its order of May 1, 1940 and passed a new order effective Oct. 15, 1940. *I. C. C. Reports, Motor Carrier Cases, Vol. 26, p. 205, at p. 208*.

⁷ *Bouvier's Dictionary*, 5th Ed., Vol. 3.

ent but by practically all courts which have considered the question.* The Circuit Court of Appeals said in this case (R. p. 6):

"The real question here is the meaning of the word 'power' in Section 13(b) of the Fair Labor Standards Act. Congress, we think, meant the existence of the power, not its actual exercise. The Fair Labor Standards Act was enacted after the Motor Carrier Act and the later statute, we believe, intended to draw a line of cleavage between those cases on which the Interstate Commerce Commission could take action and those cases on which it could not. The restricted definition of the word 'employee' in *United States v. American Trucking Association*, 310 U. S. 534, would seem to lend color to this view, and we think we find in that opinion a reflection of the philosophy of the Fair Labor Standards Act and the Motor Carrier Act to which we adhere. . . .

"The Bayley decision gives to coverage under the Fair Labor Standards Act a gap or hiatus in time, a kind of period of suspended animation to this same status of coverage. It makes certain employees subject to this Act and then, a moment later when the Interstate Commerce Commission has made the finding of necessity, the coverage of the Act suddenly ceases. We hesitate to think that Congress deliberately undertook to bring about such a situation, with all the pains, penalties and uncertainties thereunto appertaining"

Likewise, numerous District Courts reach the same conclusion. In the case of *Faulkner v. Little Rock Manufacturing Co.*, the Court said, *supra*, page 591:

"... It appearing that under the provisions of Section 304 (a) (3), Congress has delegated to the Interstate Commerce Commission the power to make regulations for qualifications and the maximum hours of

* See cases cited under Note 2 of this brief.

service for such employees, the whole field is occupied and it further appearing that under the provisions of the Fair Labor Standards Act of 1938 as amended the regulation of qualifications and maximum hours of service of employees 'with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service' have been exempted from the provisions of the Fair Labor Standards Act of 1938, there is and could be no reservation of power to the administrator of the Fair Labor Standards Act of 1938 to act until such time as the Interstate Commerce Commission shall see fit to act."

In *West v. Smoky Mountain Stages*, District Judge Underwood stated:

"... the fact that the Interstate Commerce Commission may not have assumed jurisdiction over mechanics prior to this suit is immaterial. The exemption of employees from application of the Fair Labor Standards Act is not made, by Section 13 (b) of the Act, to depend upon the exercise of power over them by the Interstate Commerce Commission but merely upon the existence of 'power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 (304 of Title 49) of the Motor Carriers Act'. The evidence in this case establishes the fact that the Interstate Commerce Commission had this power and that fact excludes jurisdiction of the administrator over the plaintiff's activities and the Fair Labor Standards Act was, therefore, not applicable in the plaintiff's situation and no cause of action is set forth in his petition."

District Judge Ford in the case of *Robins v. Zabarsky*, District Ct. of Mass., *supra*, p. 870, succinctly held:

"If the Interstate Commerce Commission has the power to fix maximum hours for a given employee, the Fair Labor Standards Act is not applicable to him regardless of whether or not the Commission has rec-

ognized the power. This is the plain language of Section 13 (b) (1) and the construction by the courts has followed it."

The question was carefully considered by the California District Court of Appeals in *McDaniel, et al., v. Clavin*, 128 Pac. 2d 821, at 826, where the Court said:

"Plaintiff denies that Sec. 213 (b) applies because the Interstate Commerce Commission has not taken jurisdiction; that it has neither prescribed nor promulgated regulations and maximum hours for the employees of Plaintiff's class. But Sec. 213 (b) contains no provision that the Commission must have established requirements or prescribed qualifications or maximum hours of service of employees in order to make it applicable. It declares merely that Sec. 207 (a) does not apply in the case of any employer with respect to whom the Interstate Commerce Commission has power to establish maximum hours of service. The provisions of the Fair Labor Standards Act for maximum working hours of employees does not, by virtue of the provisions of Sec. 213 (b) apply to those employees with respect to whom the Interstate Commerce Commission has power to establish maximum hours of service."

Likewise, in the case of *Overnight Motor Transportation Co., Inc., v. Missel*, 62 Sup. Ct. 1216, 316 U. S. 572, at p. 582, this Court discussed Section 13 (b) and the different orders and bulletins of the Interstate Commerce Commission and inferentially held that the employee would have been exempted if the Interstate Commerce Commission had the power to regulate his hours.*

* "Sec. 13 (b) (1) exempts from Section 7 employees from whom the Interstate Commerce Commission has power to establish maximum hours of service . . . These various determinations now make it clear that respondent was subject at all times since the effective date of the Fair Labor Standards Act to its provisions. The Interstate Commerce Commission never had the power to regulate his hours."

A number of other well reasoned opinions have reached the same conclusion.¹⁰ In fact practically all available authority, with the exception of the Bayley decision, construes the statute according to its plain meaning. The forceful and concise briefs filed by the petitioner in the Bayley case furnishes a complete answer to that decision.

3.

IT WAS NOT THE INTENTION OF CONGRESS TO POSTPONE JURISDICTION OVER DRIVERS OF PRIVATE CARRIERS UNTIL REGULATIONS HAD BEEN ADOPTED BY THE INTERSTATE COMMERCE COMMISSION.

A careful consideration of the Fair Labor Standards Act of 1938 shows that it intended to exempt from the overtime provisions all employees whose activities could be regulated by the Interstate Commerce Commission similarly as it exempted many other employees under Section 13 (a), such as executives, outside salesmen, employees of retail and service establishments, seamen, air-carrier employees, fishermen, farmers, apprentices, messengers, employees of small newspapers, street railway employees, etc.

The Fair Labor Standards Act was, therefore, never intended to cover all employees engaged in interstate commerce or in the production of goods for commerce as this Court recently said:

"The history of the Legislature leaves no doubt that Congress chose not to enter areas which it might have occupied."¹¹

¹⁰ See cases cited under Note 2 of this brief.

¹¹ Kirschbaum v. Walling, 316 U. S. 517, at page 522, 86 L. Ed. 1639.

The debates in the Senate on the Fair Labor Standards Act show that the law makers knew that the Interstate Commerce Commission was then undertaking to regulate truck drivers and Congress did not desire the hours of service to be subjected to two governmental agencies. Congress properly assumed that the hours of labor of truck drivers would be regulated by the Commission.¹²

As previously stated, if Congress had intended not to exempt these employees until the Interstate Commerce Commission had actually prescribed regulations, it would have done so simply by omitting the words "power to" in Section 13 (b). The uncertainty of waiting for the Interstate Commerce Commission to establish regulations is indicated in the proceedings of the Interstate Commerce Commission set forth in Note 6 of this brief.

Let us now consider Section 204 of the Motor Carrier Act of 1935 which was, of course, passed three years prior

¹² 81 Congressional Record, p. 7875:

Mr. Black: "... The committee were of the opinion when we originally took up the bill for consideration that it was exceedingly important that the long hours of truck drivers should be regulated in the interest of public safety. . . .

"Speaking for myself personally, it is my belief that it would certainly be unwise to have the hours of service regulated by two governmental agencies. I am further of the opinion that the Interstate Commerce Commission, since it has the power and has exercised it, should be the agency to be entrusted with this duty. We were very much disturbed about the matter of hours of labor required of employees of trucking companies and associations, particularly the long hours the drivers are compelled to work. Undoubtedly the Interstate Commerce Commission has adopted a regulation under the law. . . ."

Mr. Shipstead: "... Am I to understand the Senator from Alabama to say that the Interstate Commerce Commission is now undertaking to regulate hours and wages of truck drivers?"

Mr. Black: "Not wages but hours of labor."

Further discussion between Senators Black, Moore and Shipstead showed that the Senators realized that the Interstate Commerce Commission law imposed the duty on the Interstate Commerce Commission to regulate hours of truck drivers and that they did not wish to entrust the same responsibility to two governmental agencies.

to the Fair Labor Standards Act. This Section¹³ made it the duty of the Commission to regulate common, contract and private carriers and expressly to establish "maximum hours of service of employees" with which we are here concerned. The language of the three sections is somewhat different and great emphasis is placed by petitioner on the words "if need therefor is found" in Section (3). Upon a careful consideration of the three sections and their legislative history, it becomes apparent that there can be no valid distinction between them. The Interstate Commerce Commission said that the primary difference between the language used in Sections (1) and (2) and that used in Section (3) was that the phrase "to promote safety of operation" does not appear in the first two mentioned sections.¹⁴ This Court removed that distinction in the American Trucking Association case and held that employees under each section of the Act meant those whose activities affected safety of operation. Furthermore, this Court pointed out in explaining the Senate Committee's report that the Interstate Commerce Commission's authority ^{over} ~~under~~ common and contract carriers was similar to that

¹³ "Sec. 204 (a). It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this Chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this Chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. . . ."

¹⁴ Interstate Commerce Commission Reports, Motor Carrier Cases, Vol. 13, p. 481.

given over private carriers.¹⁵ Moreover, the legislative history of the Act shows that there was no reason to distinguish the authority of the Commission over the three types of carriers as the need to regulate one was as great as the other.¹⁶

It should also be noted that the permissive word "may" is used in Sections (1) and (2) of the Act and omitted in Section (3) so that it could properly be argued that it was more imperative for the Commission to prescribe qualifi-

¹⁵ "The Senate Committee's report explained the provisions of 204 (a) (1) (2) as giving the Commission authority over common and contract carriers similar to that given over private carriers by 204 (a) (3). U. S. v. American Trucking Association, *supra*, p. 548."

¹⁶ 79 Congressional Record, p. 5649, at p. 5651:

Mr. Wheeler: "The reason why we put that regulation in the Bill was because of the fact that in some instances, as was testified before the Committee, private carriers, contract carriers and common carriers frequently have their employees driving trucks and busses on the road for long periods of time without any effective regulation of any kind whatsoever. It seems to us that there is really much more cause for regulating the hours of service of the truck drivers, contract, private and otherwise . . . than there is as a matter of fact for regulating the hours of labor on the railroads themselves. This is for the reason that when an engineer is on a railroad, he has a track upon which his train runs; but a truck driver or bus driver is on the open highway and if he should fall asleep, he is not only endangering the lives of himself and his passengers, but likewise the lives of the general public."

(page 5652). In order to make the highways more safe and so that common and contract carriers may not be unduly prejudiced in their competition with peddler trucks and other private operators of motor trucks, a provision was added in sub-paragraph 3 giving the Commission authority to establish similar requirements with respect to the qualifications and hours of the employees of such operators. The exercise of this power with respect to the three classes of carriers is intended to be contingent upon the results of comprehensive investigation of the need for regulation of this kind provided for in Section 225. There is considerable demand for the provision of specific hours of service in the Bill itself. Owing to the great variety of motor carriers services and of conditions under which they are conducted, it appeared to the Committee to be unwise to go so far at this time. The investigation referred to will permit the Commission not only to develop whether there is need for regulation, but also to establish requirements which are adapted to the special conditions surrounding the different types and conditions of operation. The original Bill conferred upon the Commission power to regulate the safety of operation and equipment of common and contract carriers, and in paragraph (3) of this section, like authority has been conferred respecting the safety of operation and equipment of private carriers."

See also 79 Congressional Record, p. 12205.

cations and maximum hours of service for private carriers than for the two prior classes.

The Solicitor General, in a very learned and exhaustive brief filed on behalf of the Administrator of the Wage and Hour Division in the Southland Gasoline Company case as *amicus curiae*, criticizes the opinion of the Circuit Court of Appeals in the pending case and on page 8 says that Senator Wheeler "emphasizes the fact that such regulation of private carriers is conditioned upon a finding after investigation of need therefor." Again on pages 14 and 15, the Solicitor General disagrees with the finding of our Circuit Court that the need for regulating private carriers was obvious. One need only read Senator Wheeler's statement quoted in Note 16 of this brief which immediately followed the phrase cited above, to realize that Senator Wheeler was never in doubt as to the necessity for regulating private carriers.¹⁷ The members of the House likewise were never in doubt.¹⁸ The Congressional Record shows that Senator Wheeler was not emphasizing the phrase but doing little more than reading the provisions of the Act. An exhaustive treatise on the Act does not indicate that any special importance was ever placed upon the words.¹⁹

A careful consideration of the entire subject leads us to believe that the delay by the Interstate Commerce Commission in prescribing regulations was not caused by reason of uncertainty of the need but because of the enormity of the task and the lack of necessary appropriations.²⁰

¹⁷ 79 Congressional Record, 5651.

¹⁸ 79 Congressional Record, p. 12228.

¹⁹ Sharfman, The Interstate Commerce Commission, 1937, Vol. 4, p. 99, at pages 103, 104, 107. See also Wagner—A Legislative History of the Motor Carrier Act, 1935.

²⁰ I. C. C. Reports, Motor Carrier Cases, Vol. 3, p. 865; I. C. C. Reports, Motor Carrier Cases, Vol. 23, p. 35.

We realize that the Administrator's interpretation²¹ of an Act is usually highly persuasive as an expression of the view of those experienced in administration of the Act and acting with the advice of a staff specializing in its interpretation and application.²² However, we do not believe the same weight should be given to the Wage Administrator's interpretation of the Motor Carrier Act about which he is not presumed to have expert knowledge, especially where his construction is not supported by the Interstate Commerce Commission and against the great weight of judicial authority. His interpretations are not issued as regulations under statutory authority.

The Petitioner places great emphasis on the case of *Panama Refining Company v. Ryan, et al.*, 293 U. S. 388, and quotes from page 432 of the Court's opinion to the effect that in cases concerned with the delegation of legislative power, when an administrative agency is required as a condition precedent to an order to make a finding of facts, the validity of the order must rest upon the needed finding. This case lays down a recognized principle of constitutional law but is not apposite to the present controversy. While it may be contended under this decision and the other Supreme Court cases similar to it, that the Interstate Commerce Commission could not prescribe regulations until a hearing was held and a need was found, it most certainly cannot be said that it was not given the power to act. The existence of a power and its actual exercise are very different. The Interstate Commerce Commission had the power at all times since the approval of the Motor Carrier Act in 1935 to prescribe Petitioner's maximum hours of service.

²¹ Interpretative Bulletin No. 9. 1942 Wage-Hour Manual 378.

²² Note 17—*Overnight Motor Transportation, Inc. v. Missel*, *supra*.

CONCLUSION.

The language of the exemption statute is plain. Its meaning does not lead to an unreasonable or absurd result nor one plainly at variance with the policy of the legislation as a whole.

We submit, therefore, that this Court should follow the clear meaning of the statute and affirm the decision below. To do otherwise at this late date would not improve or in any way affect the conditions which Congress had in mind when the Act was passed but would be contrary to the plain meaning and intent of the Act and would give rise to untold litigation.

Respectfully submitted,

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Baltimore, Md.,
March 26, 1943.